(1)
Supreme Court, U.S.
FILED
021513 APR 8 2003
OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

DANIEL K. STEWART and DONNA G. STEWART,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHARLES E. MCFARLAND
6131 Campbellsburg Road
Campbellsburg, KY 40011
(502) 532-7322

Attorney for Petitioners

180116

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

10 PK

QUESTIONS PRESENTED

1. FIFTH AMENDMENT RIGHT TO REMAIN SILENT

The Fifth Amendment to the Constitution of the United States of America reads in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself." The right not to be compelled to be a witness against one's self has been expanded to include the right to remain silent when faced with real and substantial fears of criminal prosecution. Since 1927 the courts have routinely held that absent a real and appreciable hazard of self-incrimination and not merely imaginary and unsubstantial an individual required to file or provide information under a regulatory scheme addressing a public interest cannot exercise his right to remain silent with immunity. Even so, the Sixth Circuit has held in this case that taxpayers who have been given *Miranda* warnings and discovered that a criminal freeze code was placed on their IRS files before income tax returns were due and failed to file such returns are not protected by the Fifth Amendment right to remain silent.

The question presented is whether the Fifth Amendment protection of the right to remain silent is available to taxpayers and validly asserted by them by refusing file tax returns after the *Miranda* warning and freeze code dates when the IRS uses the criminal investigative process to compel these same taxpayers to chose between filing self-incriminating tax returns or face criminal prosecution for failure to file and the taxpayers are being criminally investigated for income tax crimes, have been read *Miranda* rights by an IRS special agent, and who have knowledge that all correspondence and filings made with the IRS are directed

immediately and exclusively to the Criminal Investigation Division due to a 914 criminal freeze code being present on their IMF (Individual Master File) for use in a criminal prosecution of them.

2. Speedy Trial 70 day Rule Violation

The Speedy Trial Act, 18 U.S.C. §§ 3161, *et seq.* provides that in every criminal case the accused shall be brought to trial with seventy days of his first appearance before the court, excluding certain specified delays authorized by statute. Petitioners made their first appearance before the district court on May 20, 1996. They were not brought to trial until July 7, 1998. Excluding all delays generated by the filing of various motions from the time they were filed until their hearing or other prompt dispositions Petitioners calculate that there were a total of 350 non-excludable days and thus, a violation of the 70 day rule. The district court ruled that the case was complex and outside of the dictates of the Speedy Trial Act. The Sixth Circuit upheld the district court by ruling that the continuance granted because the case was complex was reasonable and thus, no violation of the Speedy Trial Act occurred.

The question presented is whether an appellate court can uphold a district court's decision that because the case is complex it is outside the dictates of the Speedy Trial Act and rule that the district court's indefinite continuance resulting from that decision is reasonable when it did not consider the ends of justice standard of whether the time needed by the parties to prepare pretrial motions or for trial was reasonable.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Issue I	
Fifth Amendment Right To Remain Silent	1
A. Statement of the Case.	1
B. Reasons for Granting the Writ	7
1. The Decision Below Opens The Door For Serious Abuse Of The Criminal Investigative Process Warranting This Court's Immediate Intervention Because Targeted Individuals Will Be Compelled To Incriminate Themselves Or Face Prosecution.	8

Contents

Page

2. Certiorari Is Merited Because The Decision Below Conflicts With Decisions This Court and Other Circuits. 10

Issue II

Violation Of The 70 Day Rule In The Speedy Trial Act 17

A. Statement of the Case. 17

B. Reasons for Granting the Writ 22

1. Certiorari Is Merited Because The Decision Below Conflicts With A Decision This Court And Provision of The Speedy Trial Act. 23

2. Certiorari Is Merited Because The Decision Below Conflicts With Decisions Other Circuits. 28

3. Certiorari Is Merited Because The Decision Below Allows A District Court To Declare A Case Complex And Circumvent The Speedy Trial Act. 29

Conclusion 30

TABLE OF CITED AUTHORITES

Page

Cases:

Boyd v. United States, 116 U.S. 616 (1874) 10, 11

In re Burrow, 36 B.R. 960 (Bkrty. D. Ut.1984) 16

Garner v. United States, 424 U.S. 648 (1976) . 7, 11, 12, 14

Grosso v. United States, 390 U.S. 62 (1968) 8, 13, 14

Henderson v. United States, 476 U.S. 321 (1986) .. *passim*

Marchetti v. United States, 390 U.S. 39 (1968) .. 8, 13, 14

United States v. Buford, 889 F.2d 1406 (5th Cir. 1989) 15

United States v. Clymer, 25 F.3d 824 (9th Cir. 1994) 28

United States v. Gambino, 59 F.3d 353 (2nd Cir. 1995) 28

United States v. Hubbell, 530 U.S. 27 (2000) 9, 11

United States v. Jones, 56 F.3d 581 (5th Cir. 1995) ... 28

United States v. Lattany, 982 F.2d 866 (3rd Cir. 1992) 28

United States v. Pillsbury Credit Union, 661 F.2d 1195 (8th Cir. 1981) 15

Cited Authorities

Page

United States v. Rush, 738 F.2d 497 (1st Cir. 1984) . . . 28

United States v. Sabino, 274 F.3d 1053 (6th Cir. 2001) 1

United States v. Spring, 80 F.3d 1450 (10th Cir. 1996) 28

United States v. Sullivan, 274 U.S. 259 (1927) . . . *passim*

United States v. Troescher, 99 F.3d 933 (9th Cir. 1996) 7-8, 14, 15

United States Constitution:

Fifth Amendment . . . . . *passim*

Statutes and Other Authorities:

18 U.S.C. § 3161, *et seq.* . . . . . ii, 1

18 U.S.C. § 3161(c)(1) 23

18 U.S.C. § 3161(c)(2) 19

18 U.S.C. § 3161(h)(1)(F) . . . . . *passim*

18 U.S.C. § 3161(h)(1)(J) 20, 23, 24

18 U.S.C. § 3161(h)(8) 18, 21, 24, 25

Cited Authorities

	Page
18 U.S.C. § 3161(h)(8)(B)(ii)	19, 25, 26
18 U.S.C. § 3162(a)(2)	20
26 U.S.C. § 6103	17, 18, 19
26 U.S.C. § 6103(h)(5)	17
28 U.S.C. § 1254(1)	1
H.R. Rep. No. 96-390	26
S. Rep. No. 96-121	26

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Sixth Circuit Dated And Filed December 19, 2001 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Ohio, Western Division Dated And Filed June 3, 1999 ..... 44a

Appendix C — Order Of The United States District Court For The Southern District Of Ohio, Western Division Dated And Filed June 29, 1998 ..... 63a

Appendix D — Order Of The United States Court Of Appeals For The Sixth Circuit Dated And Filed January 8, 2003 ..... 66a

The petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court's order (per Weber, H.J.) denying the petitioners' motion *in limine* (Appendix ('Pet. App.') 63a-65a) and its order denying the Speedy Trial Motion to dismiss (Pet. App. 44a-62a) are unpublished. The court of appeal's opinion (per Cohn, joined by Daughtery and Gilman) affirming (Pet. App. 1a-43a) is published at *United States v. Sabino*, 274 F.3d 1053 (6th Cir. 2001). The court of appeal's orders denying Petitioners' rehearing and rehearing *en banc* (Pet. App. 66a-67a) and staying the mandate are not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on December 19, 2001 and denied rehearing and rehearing *en banc* on January 8, 2003. The stay of mandate was issued on January 24, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Fifth Amendment and the Speedy Trial Act 18 U.S.C. §§ 3161, *et seq.*, are set forth in the body of the writ as needed.

ISSUE I

FIFTH AMENDMENT RIGHT TO REMAIN SILENT

A. Statement of the Case.

Petitioners are a husband and wife to whom the *Miranda* rights were read in June of 1993 by an IRS special agent during the course of an IRS criminal tax investigation targeting them. Having been read their *Miranda* rights and having knowledge

of a 914 criminal freeze code being placed on their IRS Individual Master File (IMF) in July of 1993, which would prevent any income tax returns filed by them from being posted by the IRS, but instead would cause the returns to be sent directly to the Criminal Investigation Division (CID) to be used for criminal prosecution, the petitioners, on the advice of an attorney, declined to file any tax returns due after the *Miranda* warnings were given and the criminal freeze code was placed on their IMF.

Petitioners were subsequently indicted and the act of failing to file tax returns for the years due after the date the *Miranda* warnings were given were charged as overt acts in several income tax evasions charges and a conspiracy charge. Prior to trial in a motion *in limine* and through objections during trial when the evidence was submitted, Petitioners moved to suppress any evidence of their failing to file tax returns due after the *Miranda* warning date as a violation of their Fifth Amendment right to remain silent. On the basis of *United States v. Sullivan*, 274 U.S. 259 (1927), the district court denied the pretrial motion and sustained all objections and the evidence. The evidence of their failing to file for dates after the *Miranda* warnings were allowed as overt acts and as evidence of guilt. The Sixth Circuit upheld the district court's decision.

The court of appeals' decision warrants this Court's immediate review because it opens a Pandora's box evocative of the feared Star Chamber proceedings which the Fifth Amendment right not to be compelled to be a witness against one's self was designed to prevent. The decision of the court of appeals does not just affect taxpayers. It affects all individuals that are required to file or provide information to a particular agency under criminal sanctions. Through disallowing a legitimate exercise of the right to remain silent in the face of real and present dangers of self-incrimination the court of

appeals has opened the door for administrative agencies to abuse the criminal investigative process. As a result of the decision the criminal investigative divisions of any administrative agency may now give *Miranda* warnings to a targeted individual and that individual is forced to provide incriminating evidence to the agency by virtue of the required filing or face criminal prosecutions for failing to file or provide information.

The decision below additionally conflicts with numerous decisions of this Court and at least one other circuit holding that a criminal conviction for the income tax crime of failing to file cannot stand when a valid exercise of the Fifth Amendment right to remain silent is made in the face of a real and substantial danger incrimination.

1. Petitioners owned and operated the local business Danco Transmission, Inc., from 1973 through March 31, 1992. Beginning in 1989 Petitioners began making plans to retire. They initiated their estate planning by transferring their real property into trusts. On October 1, 1991, they sold their business to a third party running a trust form of business with a provision for their son Jeff Stewart to manage the business with an effective date of January 1, 1992. In April, 1992, Danco Transmission, Inc. notified the State of Ohio it was no longer in business and also filed an automatic extension for filing their taxes. Tragically, Jeff was killed in an automobile accident on May 16, 1992. Because of this tragic event Petitioners were forced to return from retirement to take over the management and control of the business in a form different than they had left it.

Concurrent with these facts Petitioners unfortunately became involved with the Pilot Connection and began sending letters expressing their concern with income taxes and receiving correspondence from the IRS. As a result of this correspondence in June, 1993, the IRS began a criminal investigation targeting Petitioners for income tax evasion. An IRS special agent visited

their home and gave the *Miranda* warnings that same month. The next month, July, 1993, Petitioners discovered that a 914 freeze code was inserted on their IMF. The IMF is a coded internal IRS file that operates as a coded report reflecting the status of an individual's tax history. It is freely available to any person who makes a request for his own IMF. The intended purpose of a 914 freeze code on an individual's IMF is to notify all IRS personnel that all correspondence and filings made by the particular individual with the IRS are immediately dispatched to the CID for criminal prosecution. The net result of the presence of a 914 freeze code is that nothing filed by the taxpayer, including any required tax returns, is posted or recorded for purposes of the general collection of taxes. The normal collection process for that individual is frozen. Instead, everything filed is to be scrutinized for criminal prosecution exclusively by CID.

The reading of the *Miranda* rights and the presence of the 914 freeze code caused Petitioners to believe that they were in a very real and substantial danger of their subsequent tax returns being used against them in a tax related criminal prosecution. Thus, following the advice of an attorney, they declined to file any subsequent returns that could be used to incriminate them as long as they were under criminal investigation and the 914 freeze code was present on their IMF.

Petitioners were indicted on April 2, 1996, and a superseding indictment was filed on June 19, 1996 charging them with conspiracy and income tax evasion for the years 1991 through 1994. The failures to file tax returns for the tax years due subsequent to the *Miranda* warnings were listed as elements of the charges in the form of overt acts. Prior to the trial Petitioners filed a motion *in limine* to prohibit the introduction of evidence of their failure to file tax returns that were due after they were given *Miranda* rights. Petitioners also vigorously objected

during the trial when such evidence was introduced by the government. The objections were sustained and the motion *in limine* was denied on June 29, 1996. Petitioners were subsequently found guilty and appealed.

2. The respondent argues that Petitioners failed to make any returns at all for the years 1992 through 1995. Thus, absent the filing of any return there is no Fifth Amendment privilege. The respondent's theory is based on *United States v. Sullivan*, 274 U.S. 259, 263 (1927) in that the privilege against self-incrimination does not justify an outright refusal to file a tax return. Furthermore, a mere blanket assertion of the Fifth Amendment can not suffice as a valid exercise of the privilege. Thus, according to the respondent, Petitioners failed to validly assert any Fifth Amendment privileges and have no legal basis to object to the introduction of evidence that they failed to file tax returns required subsequent to the date they were given Miranda warnings.

Respondent also argued that Petitioners had no right to refuse to provide information required for the public interest of revenue collection. Because the requirement of filing an annual tax return is directed at revenue collection and not criminal prosecution, and because the questions found on a return are neutral and directed to the public at large, the Fifth Amendment right to remain silent by not filing a tax return is not available.

3. The district court denied Petitioners motion *in limine* to suppress the evidence showing a failure to file subsequent tax returns and sustained all such objections at trial. The district court declined to comment on its legal reasoning except to cite this Court's *Sullivan* decision.

4. On appeal the Sixth Circuit upheld the district court's decision in an opinion that ignored this Court's repeated affirmations that a valid exercise of the Fifth Amendment cannot support a tax crime prosecution. The court of appeals also chose

to overlook or misinterpret distinctive facts that clearly placed Petitioners' assertion of their Fifth Amendment within the category of valid assertions. The court of appeals held that "a taxpayer claiming the Fifth Amendment privilege against the filing of a tax return must specifically claim the privilege. 'In response to particular questions, not merely in a blanket refusal to furnish any information.'" The court further held, "taxpayers cannot assert a violation of their rights against compulsory self-incrimination when they refuse to answer questions on tax returns for fear authorities will discover illegal activity." (Citation omitted) (Pet. App. 11a-12a).

The principle established by the plain reading of the court of appeals holding is that no taxpayer having a fear of authorities discovering illegal activities has a Fifth Amendment privilege against compulsory self-incrimination, whether it be the refusal to file a return or the refusal to answer particular questions. Such a blanket denial of Fifth Amendment privileges to taxpayers is not a principle supported by this Court.

The court of appeals also sought to buttress its holding by misinterpreting what a criminal freeze code represented. Instead of applying the findings of others circuits the court chose not to consider the definition of a criminal freeze code. But rather, it chose to bypass the issue of the returns being used exclusively for criminal prosecution by relying on the definition of an unrelated bankruptcy freeze code. By doing so the court of appeals virtually eliminated the criminal nature of the fears the Petitioners faced and provided a false basis for its decision to uphold the denial of Petitioners' Fifth Amendment.

5. On January 8, 2003, the court of appeals denied Petitioners' motion for rehearing and rehearing *en banc* with no additional comments.

6. A stay of mandate was issued by the court of appeals on January 24, 2003.

7. This petition for a writ of certiorari followed.

B. Reasons for Granting the Writ

The petition as to the issue of the Fifth Amendment right to remain silent should be granted for three reasons. *First*, the Sixth Circuit's judgment opens a door long closed by the Fifth Amendment to the Constitution. As a practical matter, the opinion establishes that the IRS can criminally investigate an individual for an alleged violation of income tax crimes and, through the use of the statutorily required filing of returns not yet filed, force the individual to provide information through the subsequent returns that can and will be used to incriminate him in the pending criminal prosecution. Such abuse of the criminal investigative process is not only available to the IRS, but it is available for any other agency that has the power to criminally investigate persons that also has a requirement to file information or returns to that agency. The net result is that an agency can prosecute a targeted individual with information compelled to be supplied by the individual himself, or if the individual declines to self-incriminate himself the agency can prosecute him for failure to file or provide the required information. The individual will be prosecuted whether he files or does not file.

Second, the Sixth Circuit's decision conflicts with holdings of this Court in two extremely important ways. The decision expresses the fallacious belief that taxpayers have no Fifth Amendment rights to remain silent. Such a belief is contrary to *Garner v. United States*, 424 U.S. 648, 662 (1976) which holds that a valid exercise of the Fifth Amendment cannot support a charge of failure to file tax returns. It is also in conflict with the Ninth Circuit's decision in *United States v. Troescher*, 99 F.3d

933, 936 (9th Cir. 1996) holding that there is no 'Tax-Crime Exception' regarding the Fifth Amendment.

The decision is also in conflict with this Court's principles applied in *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968) which allowed an exception to the *Sullivan* doctrine that the taxpayer cannot exercise his Fifth Amendment privilege by outright refusing to file a return, but rather, the taxpayer must file a return and claim Fifth Amendment privileges as to particular questions.

Third, the Sixth circuit's conclusion concerning the definition and effect of a criminal freeze code are in direct conflict with Fifth and Eighth Circuits understanding of the definition and purpose of the criminal freeze code.

1. The Decision Below Opens The Door For Serious Abuse Of The Criminal Investigative Process Warranting This Court's Immediate Intervention Because Targeted Individuals Will Be Compelled To Incriminate Themselves Or Face Prosecution.

Petitioners found themselves in a very unique and unusual circumstance. Before their tax returns were due for the years 1992, 1993, and 1994, the IRS began a criminal tax crime investigation. The Petitioners were read their *Miranda* rights. They also discovered that a 914 criminal freeze code on their Individual Master File (IMF). Through these events the IRS made Petitioners know that they were in a very real danger of incriminating themselves by submitting any information to the IRS from that point on. The Sixth Circuit's decision treats the situation as a run-of-the-mill tax protestor case. It wrongly assumes that Petitioners were evading taxes by using the Fifth Amendment right to remain silent. Such an assumption would only have validity if Petitioners simply had imaginary fears of incrimination. The court of appeals completely overlooked the actual danger of incrimination that was facing

Petitioners. The result was the denial of a valid exercise of the Petitioners' Fifth Amendment right to remain silent in the face of overwhelming evidence that subsequent tax returns filed by them would in fact be used in a criminal prosecution of them for income tax crimes.

While this is a highly unique fact pattern, never before addressed by any circuit, it has great and harmful impact on more than just Petitioners. The right not to be compelled as a witness against one's self comes from the Self-incrimination Clause of the Fifth Amendment. That clause reads, "No person . . . shall be compelled in any criminal case to be a witness against himself." This Court in *United States v. Hubbell*, 530 U.S. 27, 34 (2000) at footnote #8 noted the history and the purpose of the Self-incriminating Clause. The intent of the clause was "to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him." It was a protective response designed to eliminate the methods the pre-constitutional ecclesiastical and Star Chamber proceedings used to compel individuals to answer questions that would uncover criminal offenses. Thus, the Fifth Amendment had its origin in preventing such star chamber oppression. Now, through the Sixth Circuit's decision, the door that had been shut by the Fifth Amendment has been reopened.

Just as the Star Chamber proceedings forced people to answer questions to be used to later convict them, IRS through its abuse of criminal investigation process has compelled Petitioners to provide information that would be used against them in the criminal tax prosecution the IRS had in process. Petitioners legitimately exercised their right to remain silent in that they were specifically told by the IRS special agent, which was confirmed by the 914 freeze code on the IMF, that anything they gave to the IRS would be used against them in a criminal

trial. They had a choice of remaining silent and not filing subsequent tax returns or providing the government with incriminating evidence to be used in the imminent criminal prosecution. Under the first option the petitioners faced the possibility of criminal charges for failure to file. The second option meant the petitioners would be helping the government to convict them.

It is not only the Petitioners and taxpayers that are affected by the decision below. But every person made the target of any government agency that receives information from statutorily required filing of returns or information and has the power to investigate and prosecute crimes. As long as the Sixth Circuit's decision is allowed to remain intact any agency can put a targeted individual under criminal investigation and use the required filings or information subsequent to the initiation of the investigation to compel incriminating evidence in the face of criminal prosecution from failure to file such information. This is exactly the type of government abuse the Fifth Amendment was designed to prevent.

2. Certiorari Is Merited Because The Decision Below Conflicts With Decisions This Court and Other Circuits.

The Sixth Circuit's opinion is at odds with several of this Court's opinions regarding the Fifth Amendment privilege and tax crimes. The mistaken belief that taxpayers have no Fifth Amendment rights is the basis of the court of appeals decision. This court does not endorse such a belief. As far back as 1874 this Court observed in *Boyd v. United States*, 116 U.S. 616, 635 (1874) that, "illegitimate and unconstitutional practices get their first footing that way; namely by silent approaches and slight deviations from legal modes of procedure." The Court went on to admonish, "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon." With this strong vigilance in mind the

Boyd court laid down the solid and firm principle that, "A witness, as well as a party, is protected by law from being compelled to give evidence that tends to criminate him. . . ." *Boyd* at 116 U.S. 638.

But this protection does not totally exempt a person from not filing income tax returns. If a taxpayer desires to test his Fifth Amendment protection, he should test it on the return, but not fail to make any return at all. *See United States v. Sullivan*, 274 U.S. 259, 263-264 (1927). Thus, as the *Garner* court phrased the *Sullivan* holding, "the privilege against compulsory self-incrimination is not a defense to prosecution for failing to file a return at all," *Garner*, *supra*, 424 U.S. at 652. This Court in *Hubbell*, *supra*, 530 U.S. at 35 observed that, "the fact that incriminating evidence may be the by-product of obedience to a regulatory requirement, such as filing a return . . . does not clothe such required conduct with the testimonial privilege." The *Hubbell* Court in footnote 8 to the foregoing quote made the following statement regarding normal regulatory schemes, "The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes **unrelated** to the enforcement of its criminal laws," (emphasis added)

The case before the Court now is not the result of a normal regulatory scheme unrelated to the enforcement of its criminal laws because the Petitioners' exercise of their right to remain silent was not a resistance to the regulatory regime of collecting taxes. It was a response directly related to the IRS' enforcement of its criminal laws. As this Court commented in *Garner*, the Fifth Amendment is not overly broad in its range. In fact, it deals only with a relatively narrow scope of questions. One fundamental aspect of the Fifth Amendment protection is that, "Unless the government seeks testimony that will subject its

giver to criminal liability, the constitutional right to remain silent absent immunity does not arise," *Garner*, *supra*, 424 U.S. at 655. The analysis as to when the Fifth Amendment is appropriate to be used specified several more criteria to be considered before a Fifth Amendment right is denied or upheld. Fundamental to the purpose of the Fifth Amendment is the "preservation of an adversary system of criminal justice." "That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosure," *Garner*, 424 U.S. at 655-656. Thus, the government is not compelling information when it is not bypassing the "constitutionally mandated policy of adversary proceedings," *Garner*, 424 U.S. at 656.

To this end the *Garner* court formally declared that the information revealed in a prepared and filed tax return is the testimony of a witness for Fifth Amendment purposes. The distinguishing factor that prevented Garner from having the full protection of the Fifth Amendment was the relevant factor that he had a "free choice to admit, to deny, or to refuse to answer," *Garner*, 424 U.S. at 657. The *Garner* court concluded with this constitutional standard.

> As long as a valid and timely claim of privilege is available as a defense to a tax payer prosecuted for failure to make a return, the taxpayer has not been denied a free choice to remain silent merely because of the absence of a preliminary judicial ruling on his claim.

Garner, 424 U.S. at 665.

Unlike Garner, Petitioners had no freedom of choice. Since the IRS already had them under criminal investigation and the 914 freeze code guaranteed that the information would be used against them by the CID in the pending criminal investigation their freedom 'to admit, to deny or to refuse to answer' was

non-existent. If they filed the returns they knew, with the assurance and confirmation of the IRS, that everything submitted was going to CID from criminal prosecution and not through the normal income tax collection process. If they failed to file, they were legally subject to criminal prosecution for failure to file. The only choice Petitioners had was to take the IRS special agent at his word. They had a right to remain silent.

The situation Petitioners found themselves in is very similar to the factual situations of the defendants in the cases of *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968). In these two cases this Court recognized that there were occasions when the outright refusal to file a return was justified under the Fifth Amendment. This Court created an exception for failing to file an occupational return because there were "real and appreciable . . . hazards of self-incrimination."

This Court in *Marchetti* granted certiorari to examine the constitutionality of certain wagering tax statutes. It concluded that these provisions may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination, *Marchetti*, 390 U.S. at 42. The issue was, "whether the methods employed by Congress in the federal wagering tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment", *Marchetti*, 390 U.S. at 44. The case turned on the Court's analysis of the *Sullivan* case.

The *Marchetti* Court viewed Sullivan as being concerned with two major issues. The first issue was the unwarranted extension of the Fifth Amendment. The second issue, the one crucial to *Marchetti* and Petitioners in this case, was "that to accept a claim of privilege not asserted at the time of the return was due, would 'make the taxpayer rather than a tribunal the

final arbiter of the claim,'" *Marchetti*, 390 U.S. at 50. The essential standard in determining whether the claim of a Fifth Amendment privilege was valid or not was the presence of "substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination," *Marchetti*, 390 U.S. at 53. The Court felt that instead of Marchetti being the final arbiter of the merits of the claim the statutes actually created the hazard.

Petitioners are in the same circumstance. Not only was their freedom to admit, to deny, or to refuse to answer taken away from them, but they were not the final arbiters of their claim. The IRS policy and procedures created the hazard. Once the IRS special agent targeted the Petitioners and a 914 freeze code was inserted on their IMF they and their filings were no longer a part of the public purpose of collecting revenue. Everything was directed to their prosecution. The only difference between *Marchetti* and the instant case is a statute created the real hazard of self-incrimination in *Marchetti*, whereas in the Petitioners' case the IRS internal policy created the real danger. In either case, there were substantial and real dangers of self-incrimination by merely filing a return. The *Grosso* case was decided in an identical way, except it focused on whether the Fifth Amendment claim would protect the taxpayer from the charge of conspiracy, a charge with the Petitioners also face. The Court held that it would.

Not only is the decision below in decided conflict with *Sullivan*, *Garner*, *Marchetti* and *Grosso*, it is also in conflict with the decision in the Ninth Circuit, *United States v. Troescher*, 99 F.3d 933 (9th Cir. 1996). The decision below clearly implemented the 'tax-crime exception' to the Fifth Amendment. The *Troescher* case specifically stated that the Fifth Amendment had no 'tax-crime exception.' The court made it clear that the case law in the Ninth Circuit allowed the Fifth Amendment to be validly invoked when a taxpayer was facing prosecution for

tax crimes, *United States v. Troescher*, *supra*, 99 F.3d at 936. The case also analyzed previous cases which had been perceived as upholding a 'tax-crime exception' and determined that those cases merely disallowed the privilege when the asserting of it was based on "only vague, blanket, or generalized claims of self incrimination," *United States v. Troescher*, *supra*, 99 F.3d at 935. While the *Troescher* court only looked at the Ninth Circuit cases, the foregoing cases of this Court have reached the same conclusion.

The facts of the case present a scenario very much different than the circumstances in cases which deny the right. The essence of Petitioners' Fifth Amendment claim is not that they used the Fifth Amendment because they feared possible incrimination, but they apprehended a real danger. The government via the *Miranda* rights told Petitioners that anything they gave the government would be used against them in a court of law. Not only were they under criminal investigation for income tax charges, they knew that there was a 914 freeze code placed on their Individual Master File (IMF). One of the problems the court of appeals had in understanding the nature of the real and substantial hazards Petitioners were facing in the case below was its inability to recognize the significance of the 914 freeze code placed on Petitioners IMF. The court of appeals relied on a bankruptcy court definition of a bankruptcy freeze code, rather than the definition used by other circuits. Several courts have confirmed and defined the purpose of the criminal freeze code. *See United Sates v. Buford*, 889 F.2d 1406, 1408 #4 (5th Cir. 1989) (IRS testifying that a freeze code causes a filed return to be rejected); and *United States v. Pillsbury Credit Union*, 661 F.2d 1195, 1197 (8th Cir. 1981) (record reflected presence of Criminal Investigation Control Notice, i.e. TC 914 used to temporarily prohibit assessment and collection of taxes during criminal investigation).

The significance of the 914 criminal freeze code is crucial to the Fifth Amendment claim. The '914 freeze code' was posted to Petitioners' IMF on July 22, 1993 The presence of the 'TC 914 freeze code' on Petitioners' IMF indicates that all information provided by Petitioners would not go through the regular channels for income tax collection. Tax returns filed by the general public are used to collect revenue. The presence of a 914 criminal freeze code on an IMF prevents income tax collection activities. A tax return or any other information filed by a person under criminal investigation is sent directly to the Criminal Investigation Division for the prosecution of tax crimes. All information filed after a criminal freeze code appears is used for one purpose, and one purpose only, criminal prosecution.

By not considering the decisions of the Fifth and Eighth Circuits the panel gives the appearance of seeking a way to disregard these crucial facts by relying on a bankruptcy case that is completely irrelevant to the issues raised on appeal. The foregoing cases clearly indicate the purpose of a criminal freeze code. The case of *In re Burrow*, 36 B.R. 960, 961 (Bkrty. D. Ut. 1984), cited by the panel does not address the criminal freeze code. It specifically states that the freeze code in question was a bankruptcy freeze code posted to honor the automatic stay against creditors of the person filing for bankruptcy. The bankruptcy freeze code is a separate code for another purpose that does not involve the Criminal Investigation Division.

As this Court grasps the true significance of the presence of the 914 criminal freeze code and what it actually does, it will understand perfectly why an apprehension of a real danger of incrimination existed and the Fifth Amendment right to remain silent was validly asserted. This Court will understand that the dangers of self-incrimination facing Petitioners was even more

than a real danger. It was a guarantee by the government that any information supplied by them would be used to incriminate them. Thus, in keeping with the long line of cases in which this Court has ruled that Fifth Amendment claims are valid in the face of real and substantial hazards of self incrimination this Court should grant certiorari to examine the question whether the Fifth Amendment limitations are applicable to agency criminal investigations that involve persons who are read *Miranda* rights and whose flings and correspondence with a governmental agency are directed towards criminal prosecution and whether said persons can validly exercise their Fifth Amendment right to remain silent by opting not to file the required return.

ISSUE II

VIOLATION OF THE 70 DAY RULE IN THE SPEEDY TRIAL ACT

A. Statement of the Case.

Petitioners were indicted on April 2, 1996, for income tax evasion for the years 1991 through 1994. A superseding indictment was filed on June 19, 1996, adding a conspiracy charge and another defendant. On May 20, 1996, they were arraigned and several motions were filed. On May 28, 1996, a motion for IRS jury information under 26 U.S.C. § 6103(h)(5) was filed. At the time of their first hearing before the district court on May 28, 1996 there were five motions pending, including the 6103 jury information motion.

Prior to the hearing Petitioners' local counsel filed a motion to extend time to prepare pretrial motions and was prepared to argue for that extension. Two of the primary reasons local counsel requested the extension were: 1.) time was needed for Petitioners to obtain attorneys to prepare the case and 2.) the indefinite time it would take to process a 6103 jury information

request. The Court extended the time to file pretrial motions to June 28th. At the hearing the district court also inquired as to whether the case was a complex case. In the ensuing discussion, the Court specifically stated, "And therefore the 70-day rule doesn't apply because we're granting the continuances so we can handle the motions,"

On May 31st the Court issued two orders. One of the orders stated the Court's reasons for vacating the trial date. Two reasons were listed. The first reason was the need for Petitioners to obtain attorneys. The Government required additional time to provide discovery was listed as the second reason. The district court effectively made a proper 'ends of justice' finding as required by subsection 3161(h)(8) even though complexity was not a listed reason.

During the course of the next several months numerous motion were filed by all defendants. The excludable period of time under 18 U.S.C. § 3161(h)(1)(F) for the longest excludable time of those motions was the 6103 jury information request. The issue was settled by the receipt of the jury information by the District Court from the Treasury Department. The Court notified the parties on April 2, 1997 of that receipt.

Other than the district court issuing orders on motions whose excludable time expired prior to April 2, 1997, there was no activity on the docket sheet record from April 2, 1997, until November 12, 1997, when the Government filed a motion which was granted on November 19, 1997. From that date until February 6, 1998, when the Government filed a motion for disclosure of grand jury testimony there was no activity reflected on the docket sheet. The February 6th motion was granted the same day. No other action occurred until April 6, 1998, when the Government filed a sealed motion for leave to notify the Court. This motion was denied on June 5, 1998. From April 2, 1997, until April 6, 1998, the district court only held one status

conference. That conference was a telephone conference scheduled on February 24, 1998, to set a date for the trial. What triggered the need for that conference is unknown.

Prior to the trial Petitioners filed a Motion to Dismiss because of a violation of the Speedy Trial Act. A jury trial commenced on July 7, 1998 without the Speedy Trial Act motion being ruled on. Petitioners were convicted on all counts on September 14, 1998. It was not until April 1, 1999, that the district court issued an order denying the speedy trial motion. The Sixth Circuit upheld the district court's denial of the Speedy Trial Act motion, albeit for different reasons.

The court of appeals decision warrants this Court's immediate review because it conflicts with a leading decision of this Court concerning the length of time an ends of justice continuance can be granted due to the complexity of a case under 18 U.S.C. § 3161(h)(8)(B)(ii). The lower court decision also presents a third factor among the already split circuits.

1. Petitioners filed their motion to dismiss because of a long period of virtually no activity on the docket sheet from April 2, 1997, to April 6, 1998. 18 U.S.C. § 3161(c)(2) provides that in any criminal trial the accused must be brought to trial within 70 days from the date the defendant makes his first appearance, less any time excluded by statute. Taking into account the brief periods related to two motions filed by the respondent which were also immediately disposed, Petitions calculated that 350 non-excludable days passed from April 2, 1997, through the start of the trial. Petitioners used the starting date of April 2, 1997, because under § 3161(h)(1)(F) all time from the filing of the motion until its resolution or other prompt disposition is excludable. The 6103 motion for jury information was filed on Petitioners first day of appearance and it was the last outstanding motion whose exclusion time had not expired to be resolved. It was resolved on April 2, 1997, when the

requested jury information was acknowledged to have been received by the district court. There were several motions that were filed earlier in 1997 and the district issued orders of these during this period of time, but the excludable time permitted for such motions expired prior to April 2, 1997, pursuant to §§ 3161(h)(1)(F) and 3161(h)(1)(J). Since 350 non-excludable days far exceeds the permitted 70 day time frame the indictment was required to have been dismissed pursuant to 18 U.S.C. § 3162(a)(2).

2. Respondent argues that the district court declared the case complex with the parties' full cooperation, based on hearings in October and November of 1997. The complexity of the case was the major factor in granting the unlimited continuance. The respondent also maintained in its appellate brief that the case was well supervised by the district court because there were four status conferences in 1997 and 1998. What the respondent did not make clear was that three of those four status conferences were held on or before April 2, 1997. Thus, from April 2, 1997, through April 6, 1998. There was only one status conference and that one was scheduled to set the trial date.

3. The district court did not rule on the motion before trial. Instead it waited until June 3, 1999, to deny the motion. This was the same day as Petitioners' sentencing. The district Court's sole reason for granting the continuances was,

> Based on the belief that it was unanimously recognized to be a complex case *and outside the dictates of the Speedy Trial Act*, the Court continued the trial date again on September 20, 1996 and set up a status conference as is its practice when a case has been found to be complex.

(Emphasis added) (Pet. App. 55a). On this basis the district court found all of the time from the first day of appearance until the

trial date excludable. The district court also stated in the June 3, 1999, order, "Moreover, were the Court to apply the Speedy Trial Act to the facts of the case, it would reach the same conclusion," (Pet. App. 57a).

4. On appeal the Sixth Circuit court of appeals upheld the district court's decision, but not for the same reasons. The court of appeals did not rule that the case was complex and outside the dictates of the Speedy Trial Act as the district court did. It readily acknowledged that the district court found the case to be complex and that an indefinite continuance was based on the fact that the case was complex. The court of appeals then concluded the delay caused by the unlimited continuance as reasonable through an analogy to this court's decision in *Henderson v. United States*, 476 U.S. 321 (1986). The court below presumed that since Congress did not establish that delays under § 3161(h)(8) needed to be reasonable delays then the court had the control to decide their own methods to deal with potentially excessive continuances. Accordingly, the court of appeals announced that it was following the rule of the First, Third, Fifth, and Tenth Circuits that open-ended continuances are permissible if they are for reasonable time periods (Pet. App. 8a-10a).

The decision of the court of appeals, however, misinterpreted both the statute and the *Henderson* case. Furthermore, it did not follow the rule of the other circuits. Instead, the decision below clearly establishes a principle not endorsed by either this Court or the other circuits. The court of appeals left it to the district court to decide that the case before it is not subject to the rule of the Speedy Trial Act because of its complexity. The decision also allows for a district court to grant indefinite continuances without establishing on the record what would trigger the end of the continuance.

5. On January 8, 2003, the court of appeals denied Petitioners' motion for rehearing and rehearing *en banc* with no additional comments.

6. A stay of mandate was issued by the court of appeals on January 24, 2003.

7. This petition for a writ of certiorari followed.

B. Reasons for Granting the Writ

The petition for a writ of certiorari with respect to the violation of the 70 day rule of the Speedy Trial Act should be granted for three very important reasons. *First*, the decision below is in direct conflict with both this Court's guidance in the *Henderson* case which noted that Congress provided for reasonable continues in complex cases to allow preparation for pretrial motions and for trial (*Henderson*, 476 U.S. at 327 footnote #8) and with the provisions of the Speedy Trial Act itself.

Second, the decision also conflicts with all of the other circuits that have addressed end of justice continuances which either state that an end of justice continuance must have stated limits or it must be reasonably limited.

Third, the decision below also needs to be reviewed by this Court because the Speedy Trial Act has been effectively nullified with respect to complex cases. On the basis of the court of appeals' decision, all a district court must do to evade the time restriction of the Speedy Trial Act is to determine that the case before it is complex. Once the case is determined to be complex it is outside the dictates of the Speedy Trial Act. Such was not the intention of Congress. Should the Sixth Circuit's opinion be used as precedence all criminal defendants in complex cases will lose the benefits of the Speedy Trial Act. They will lose their statutorily guaranteed right to a speedy trial simply by the court deciding that their case is complex. The rights of the

Speedy Trial Act will also be lost to the public and cases that should have been handled expeditiously will drag on for years as this one did. The result will be a court calendar quagmire.

1. Certiorari Is Merited Because The Decision Below Conflicts With A Decision This Court And Provision of The Speedy Trial Act.

The Sixth Circuit's decision below is in conflict this Court's decision in the *Henderson* case. In its attempt to use the reasoning of the *Henderson* case by analogy the court of appeals misinterpreted the decision. The decision of this Court in *Henderson* was addressed to continuances under 18 U.S.C. § 3161(h)(1)(F) and the limits placed on such continuances by § 3161(h)(1)(J).

18 U.S.C. § 3161(c)(1) provided for specified time in which criminal defendants must be brought to trial. It reads:

> (c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

Congress provided for certain delays to be excluded from the counting of the 70 days. Two pertinent provisions

related the such exclusions are sections § 3161(h)(1)(F) and § 3161(h)(1)(J) which read as follows:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to –
>
> * * *
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
>
> * * *
>
> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

The Conclusion reached by this court in *Henderson* was that since Congress did not specifically state that reasonableness was a factor all of the time from filing of the motion until its hearing or other prompt disposition was excludable, *Henderson*, 476 U.S. at 330.

The court of appeals attempted to use the reasoning of *Henderson* and by analogy apply it to 18 U.S.C. § 3161(h)(8) sometimes called the 'ends of justice' delays. Said section reads:

> (8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at

> the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

The court of appeals reasoned that since section 3161(h)(8) was in many respects the same as section 3161(h)(1)(F), in that no reasonableness standard appeared to be required, any control of potentially excess continuances was left up to the court. The court of appeals overlooked several factors in reaching this erroneous decision. *First*, while *Henderson* decision does appear to disregard reasonableness with regard to § 3161(h)(1)(F), the ground the district court claims to have relied upon was § 3161(h)(8)(B)(ii). § 3161(h)(8)(B)(ii) reads as follows:

> (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:
>
> * * *
>
> (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to

> expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

Thus, § 3161(h)(8)(B)(ii) does contain a reasonableness standard. This is confirmed by footnote #8 in *Henderson* which states, "'However, the Committee would permit through its amendments to subsection (h)(8)(B) reasonable preparation time for pre-trial motions in cases presenting novel questions of law or complex facts.' S. Rep. No. 96-121 at 33-34." The House of Representative had the same intent. In H.R. Rep. No. 96-390 at 1 the House noted that one of the purposes of the Speedy Trial of 1974 was to clarify "provisions relating to authority for courts to order continuances when required to meet 'the ends of justice.'" Congress clearly intended to make changes to provide for 'ends of justice' continuances. One such change to accomplish its objective was,

> Revise language relating to the grant of continuances based on the complexity or unusual nature of a case to clarify that such continuances can be granted on the basis of delays in preparation of the case in all phases of the case, including, for example, in the preparation of complex pretrial motions.

H.R. Rep. No. 96-390 at 13. Thus, the standard intended to be applied was a reasonable period of time to prepare pretrial motions.

Second, the court of appeals appears to have overlooked the crucial fact that the district court's decision to grant an opened ended continuance was, "Based on the belief that it was unanimously recognized to be a complex case and outside the dictates of the Speedy Trial Act, the Court set up a status conference as is its practice when a case has been found to be complex," (Pet. App. 55a)

No where in the statute, in its legislative history or in the *Henderson* decision was there any authority, explicitly or implied, for a district court to determine that a complex case was outside the dictates of the Speedy Trial Act. The district court granted an unlimited continuance because of its belief that it no longer had to contend with the 70 day rule since the complexity of the case removed it from the rule of the Speedy Trial Act.

Third, the district court clearly did not consider the Speedy Trial Act standards when it granted the indefinite continuance. By its own admission it did not find an ends of justice analysis to the facts of the case until June 3, 1999, more than two and a half years after the continuance was granted. The district court stated, "Moreover, were the Court to apply the Speedy Trial Act to the facts of this case, it would reach the same conclusion," (Pet. App. 57a). This *post hoc* decision was completely overlooked by the court of appeals.

Fourth, for some unknown reason the court of appeals overlooked the fact the more than a year passed from April 2, 1997, to April 6, 1998, with only one status conference. Thus, its holding that the case was well supervised during the 350 non-excludable days and that any delay was reasonable is not in conformity with the facts of the case. It also overlooked the fact that no limitation was placed in the record by the district that would signal or trigger the end of the continuance. The continuance was indefinite, subject to end only at the whim of the district court.

Thus, the decision of the court below is actually contrary to this Court's comments in Henderson. It is also contrary to the statute.

2. Certiorari Is Merited Because The Decision Below Conflicts With Decisions Other Circuits.

In its decision the Sixth Circuit analyzed other circuit opinions, it discovered that there was a split among the circuits regarding the opened ended continuances. It found on the one hand, that the Ninth Circuit did not permit open ended continuances. All ends of justice continuance had to be specifically limited, *United States v. Clymer*, 25 F.3d 824 (9th Cir. 1994). On the other hand, other circuits allowed opened ended continuances, but all expressed a belief that such continuance should be reasonably limited. This requirement is in accord with the statute and the *Henderson* Case. These circuits addressed the issues and found opened ended continuances permissible but with a need for limitations: *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984); *United States v. Gambino*, 59 F.3d 353 (2nd Cir. 1995); *United States v. Lattany*, 982 F.2d 866 (3rd Cir. 1992); *United States v. Jones*, 56 F.3d 581 (5th Cir. 1995); and *United States v. Spring*, 80 F.3d 1450 (10th Cir. 1996).

The Sixth Circuit, however, does not follow the rule of these circuits. Every one of these circuits dealt with continuances granted to enable the parties to prepare for pretrial motions or for trial in one way or another. Not one of them ruled the complexity of the case took it outside the dictates of the Speedy Trial Act. The reasonableness standard the other circuits applied was in fact the reasonableness standard intended by Congress, a reasonable time for the parties to prepare. The reasonableness standard applied by the Sixth Circuit was an after the fact consideration of whether the time length of the continuance was reasonable. No consideration whatsoever was given to the time needed for the parties to prepare to pretrial motions or for the trial itself.

3. Certiorari Is Merited Because The Decision Below Allows A District Court To Declare A Case Complex And Circumvent The Speedy Trial Act.

It is important to grasp the fact that the district court in this case ruled that the case was complex and outside the dictates of the Speedy Trial Act. It did not grant the continuance based on an analysis of needed pre-trial motion preparation or trial preparation. Even when it did its alleged end of justice findings it was a *nun pro tunc* decision on June 3, 1999. The findings were not an end of justice finding, but a finding revolving around the case being complex and not preparation time. Through the court of appeals upholding the district court's removal of the case from the provisions of the Speedy Trial Act, it has effectively signaled to the district courts that there now a way of circumventing the time restrictions in Speedy Trial Act. All a district court needs to do is declare the case complex. Once the court has a declared complex the case is outside the dictates of the Speedy Trial and the 70 day rule does not apply.

That this is not an unusual occurrence is belied by the district court's statement that it did this on a customary and regular basis (Pet. App. 56a). If other courts should follow the lead of the Sixth Circuit then every criminal defendant that has a complex case runs the risk that his case will be declared complex and outside the dictates of the Speedy Trial Act. Such was not the intent of Congress and is something this Court can prevent by granting the writ of certiorari to examine this question and resolve the conflict among the circuit courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES E. MCFARLAND
6131 Campbellsburg Road
Campbellsburg, KY 40011
(502) 532-7322

Attorney for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED DECEMBER 19, 2001

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-3745/3785/3786/3863

UNITED STATES OF AMERICA,

Plaintiff-Appellee/
Cross-Appellant (99-3863),

v.

JOE SABINO (99-3745);
DANIEL K. STEWART (99-3785);
DONNA G. STEWART (99-3786),

Defendants-Appellants/
Cross-Appellees.

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 96-00046—Herman J. Weber, District Judge.

Argued: September 11, 2001

Decided and Filed: December 19, 2001

Before: DAUGHTREY and GILMAN, Circuit Judges;
COHN, Senior District Judge.*

---

* The Honorable Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

OPINION

AVERN COHN, Senior District Judge. Defendants Daniel Stewart (Mr. Stewart), Donna Stewart (Mrs. Stewart), and Joe Sabino (Sabino) (collectively the defendants) were convicted of conspiracy to defraud the United States by obstructing the functions of the United States Internal Revenue Service in violation of 18 U.S.C. § 371. The Stewarts were also convicted of tax evasion in violation of 26 U.S.C. § 7201.

The Stewarts appeal their convictions, raising the following issues: whether the Speedy Trial Act was violated; whether their Fifth Amendment right to remain silent was violated when their failures to file tax returns were charged as overt acts in the indictment and introduced as evidence at trial; whether the district court erred in allowing an IRS employee to testify as a summary witness for the government; whether the jury was properly instructed; and whether their net worth calculation was erroneous.

Sabino appeals his conviction, arguing that there was insufficient evidence to convict him of conspiracy to defraud the United States in violation of 18 U.S.C. § 371.

The government cross-appeals the district court's sentencing decisions, including: failing to enhance Mrs. Stewart's and Sabino's offense levels for obstruction of justice; failing to enhance each defendant's offense level for sophisticated concealment; reducing Sabino's offense level for a minor role in the offense; and granting Sabino a downward departure.

Appendix A

For the reasons that follow, the defendants' convictions will be affirmed. We find, however, that the district court erred in granting Sabino a minor role reduction and in failing to enhance the Stewarts' and Sabino's offense levels for sophisticated concealment. Therefore, the sentencing determinations will be affirmed in part and reversed in part, and the case will be remanded for re-sentencing consistent with this opinion.

I. *BACKGROUND*

A. *Factual Background*

In 1989, the Criminal Investigation Division of the Internal Revenue Service conducted an investigation of Phillip Marsh, the founder of an organization called the Pilot Connection Society (PCS), which, among other activities, instructed individuals on methods to avoid paying federal and state income taxes. Through the execution of a search warrant on Marsh's residence and property, the IRS obtained a list of people who were affiliated with the PCS. Two of the people on the list were defendants Daniel and Donna Stewart. The Stewarts owned and operated Danco Transmission, Inc. (Danco), in the Cincinnati, Ohio, area since 1971.

Because of their connection with PCS, the Civil Division of the IRS investigated the Stewarts' compliance with federal tax laws and discovered in 1992 that they were overdue in submitting their 1990 tax return. The IRS queried the Stewarts about their failure to file the tax return. The Stewarts responded by "revoking" their tax returns from 1955 to 1989 (a declarative act which had no substantive effect on their

tax obligations). A series of letters ensued between the IRS and the Stewarts, during which the Stewarts sent the IRS anti-tax information obtained through their connection with PCS and other sources. The Stewarts eventually filed their 1990 income tax return, but they did not file any personal income tax returns for the years 1991, 1992, 1993, and 1994. Danco also failed to file corporate tax returns in 1992, 1993, and 1994.

The IRS then commenced a criminal investigation of the Stewarts. The investigation established that in 1990, the Stewarts closed all of their personal checking and savings accounts, redeemed certificates of deposit and paid off loans. In addition, in 1991, they dissolved Danco pursuant to Ohio law. Danco, however, continued to operate. In reliance on the PCS "untax" instructions, the Stewarts created seven primary trusts and transferred all of their assets, including Danco, to the trusts. Evidence at trial showed that the trusts paid the personal and business expenses of the Stewarts and were used to purchase various personal items for use by the Stewarts and their family. There was no evidence at trial that the IRS received any of the requisite paperwork concerning the trusts; no fiduciary income tax returns were filed on behalf of the trusts from 1992 to 1994.

During the years the trusts "existed," the Stewarts asked relatives, friends, and employees of Danco to serve as trustees of the trusts. The nominal trustee for each of the trusts often changed. Evidence at trial established that many of the trustees did not know the nature of a trust or could not explain the nature of their responsibilities as trustee. Some trustees indicated that Mrs. Stewart guided the daily operations of

the trusts. The evidence showed that Sabino served as the trustee for several of the trusts, and his signature or signature stamp appeared on many of the documents regarding transactions undertaken by the trusts.

B. *Procedural Background*

A federal grand jury returned an indictment against the Stewarts on April 2, 1996, and a superceding indictment on June 19, 1996, adding Sabino as a defendant. The superceding indictment charged Sabino and the Stewarts with conspiracy to defraud the United States by obstructing the functions of the Internal Revenue Service in violation of 18 U.S.C. § 371, and the Stewarts with an additional four counts of willfully attempting to evade income taxes in violation of 26 U.S.C. § 7201. Following a 32 day trial, the jury returned guilty verdicts against the three defendants on all counts, except that Mr. Stewart was acquitted on the charge of willfully attempting to evade income taxes for 1994.

A motion for judgment of acquittal, pursuant to Fed. R. Crim. P. 29, was denied. The district court sentenced each of the Stewarts to 18 month concurrent terms of imprisonment on each count of conviction, three years supervised release, and fined them each $41,750. Restitution totaling $129,000 was ordered.

Sabino was subject to a 12 to 18 month sentence of incarceration under the guidelines. The district court granted a motion for downward departure and sentenced him to five years' probation. Sabino was included in the ordered restitution of $129,000 jointly and severally with the Stewarts.

Appendix A

II. *DISCUSSION*

A. *Speedy Trial Act*

1.

The Stewarts argue that the district court erred in denying their motion to dismiss the superceding indictment because of a violation of the Speedy Trial Act, 18 U.S.C. § 3161 (the STA), which requires that a criminal defendant be brought to trial within 70 days from the latest date of arrest, the filing of an indictment, or the first appearance before the court. *Henderson v. United States*, 476 U.S. 321, 323 (1986). The STA provides that if this time limit is exceeded, an indictment "shall be dismissed on motion of the defendant," with or without prejudice. 18 U.S.C. § 3162(a)(2). However, the STA also provides for periods of excludable delay during which the 70-day "clock" does not operate. *See id.* § 3161(h). The district court has discretion to exclude a delay from the 70-day time limit, and a decision to exclude a delay will only be reversed upon a showing of actual prejudice. *United States v. Cianciola*, 920 F.2d 1295, 1298 (6th Cir. 1990) (citing *United States v. Monger*, 879 F.2d 218, 221 (6th Cir. 1989)).

The indictment was returned on April 2, 1996; the superceding indictment was returned on June 19, 1996. The district court granted indefinite ends-of-justice continuances on May 29, 1996, September 20, 1996 and October 31, 1996 on the basis that the case was complex. The Stewarts filed a motion to dismiss the indictment for violating the STA on June 2, 1998. The Stewarts concede that several of their motions delayed commencement of the STA clock. They

argue that the STA clock began ticking on April 3, 1997, when the district court acknowledged receipt of IRS jury information, the final information requested in their remaining motion made after their arraignment on May 20, 1996. Discounting excludable delay periods after the clock commenced until the trial on July 7, 1998, the Stewarts argue that 350 non-excludable days passed in violation of the STA.

The district court denied the Stewarts' motion to dismiss on June 3, 1999, relying partially upon a finding that continuances were warranted to serve the ends of justice as a result of the case's complexity. The Stewarts argue that the district court did not make sufficient findings to buttress an ends-of- justice continuance based on the complexity of the case.

According to § 3161(h)(8)(A), delay resulting from a court-ordered continuance is excluded if it is based on a finding that the ends of justice served by the continuance outweigh the best interest of the public and the defendant in a speedy trial." When granting an ends-of-justice continuance, the district court must set forth its actual reasoning for the continuance in the record. *See* 18 U.S.C. § 3161(h)(8)(A); *United States v. Crawford*, 982 F.2d 199, 204 (6th Cir. 1993).

In its June 3, 1999 order, the district court clearly stated that it granted a continuance due to the complexity of the case and that the continuance served the ends-of-justice. The district court referred back to its previous oral and written orders that granted continuances based upon ends-of-justice findings stemming from the complexity of the case. The record establishes that the district court declared the case as complex, ostensibly with the agreement of the defendants' attorneys.

Appendix A

This was a tax evasion case of complex proportions involving the wrongful use of third parties and the hiding of assets in trusts. The district court convened periodic status conferences to ensure that the case proceeded expeditiously to trial. Furthermore, the Stewarts waited to bring a motion to dismiss the indictment over a year after the date on which they contend the STA clock commenced. The Stewarts' tardiness reflects their agreement with the district court's calendar for bringing the case to trial. Accordingly, the district court did not abuse its discretion in granting ends-of-justice continuances.

2.

The Stewarts also argue, relying upon Ninth Circuit precedent, that the district court erred in granting indefinite ends-of-justice continuances. *See United States v. Clymer*, 25 F.3d 824, 828 (9th Cir. 1994) (holding that an ends-of-justice continuance must be specifically limited in time). While this Circuit has not addressed this particular issue, other circuits have, with results contrary to the Ninth Circuit's holding. In *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984), the First Circuit remarked that "[t]he purpose of (h)(8) continuance is to make the [STA] 'flexible enough to accommodate the practicalities of our adversary system.' We do not think a rule barring open-ended continuances altogether serves this purpose." *Id.* at 508 (quoting *United States v. Mitchell*, 723 F.2d 1040, 1044 (1st Cir. 1983)). The First Circuit opined that open-ended ends-of-justice continuances may be limited by a reasonableness requirement so as to prevent unfair delays and circumventions. *Id.*; *see also United States v. Pringle*, 751 F.2d 419, 433 (1st Cir. 1984). The Third Circuit also rejected a bar against open-ended continuances, but it expressly adopted a

reasonableness limitation upon justified delays. *See United States v. Lattany*, 982 F.2d 866, 868 (3rd Cir. 1992). Several other circuits have followed the First and Third Circuits. *See United States v. Jones*, 56 F.3d 581, 586 (5th Cir. 1995) (district court may grant open-ended continuances in situations where "it is impossible, or at least quite difficult, for the parties or the court to gauge the length of an otherwise justified continuance."); *United States v. Spring*, 80 F.3d 1450, 1458 (10th Cir. 1996) (agreeing with the First, Third, and Fifth Circuits that open-ended continuances for a reasonable time period are warranted in some cases); *see also United States v. Burke*, 673 F.Supp. 1574, 1578 (N.D.Ga.1986) (in some cases open-ended ends-of-justice continuances are warranted). The Second Circuit held that the "length of an exclusion for complexity must be not only limited in time, but also reasonably related to the actual needs of the case." *United States v. Gambino*, 59 F.3d 353, 358 (2d Cir. 1995) (citing *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181 (2d Cir. 1989), *United States v. LoFranco*, 818 F.2d 276, 277 (2d Cir. 1987)).

In *Henderson v. United States*, 476 U.S. 321 (1986), the Supreme Court discussed the propriety of a reasonableness requirement with regard to another provision establishing delays excludable from the STA's clock, specifically 18 U.S.C. § 3161(h)(1)(F), which excludes from speedy trial calculations any period of delay caused by a pretrial motion. The Supreme Court reasoned that the STA employs a reasonableness standard for the exclusion of time only when Congress explicitly requires that the period of delay be

reasonable.[1] With respect to the possibility of potentially excessive continuances, the Supreme Court found that Congress left such considerations within the control of district courts rather than the statute itself. *See Henderson*, 476 U.S. at 328. By analogy, § 3161(h)(8) also does not contain a reasonableness requirement since its language mirrors § 3161(h)(1)(F) in all pertinent respects. Since *Henderson* signals that district courts may devise their own time limits with respect to this issue, we will follow the rule of the First, Third, Fifth, and Tenth Circuits and hold that open-ended ends-of-justice continuances for reasonable time periods are permissible in cases where it is not possible to preferably set specific ending dates.

---

1. The Supreme Court stated:

> On its face, subsection (F) excludes "[a]ny period of delay" caused by "any pretrial motion," "from the filing of the motion through the conclusion of the hearing." The plain terms of the statute appear to exclude all time between the filing of and the hearing on a motion whether that hearing was prompt or not. Moreover, subsection (F) does not require that a period of delay be "reasonable" to be excluded, although Congress clearly knew how to limit an exclusion: in § 3161(h)(7), Congress provided for exclusion of a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." Apart from this single instance, every other provision in § 3161(h) provides for exclusion of "any period of delay."

Id. at 326-27.

Appendix A

The district court's oral and written rulings granting the ends-of-justice continuances demonstrate that this case deserved open-ended continuances. The delay in commencing trial was reasonable given the volume of evidence the government marshaled and the complexity of the defendants' tax evasion scheme. Further, a large portion of the pre-trial period was spent addressing the defendants' numerous motions. Accordingly, there was no unreasonable delay in the management of this case and the STA was not violated by the district court's granting of open-ended ends-of-justice continuances.

B. *Fifth Amendment Claim*

During the government's investigation of the conspiracy in 1992, an IRS investigator during an interview read the Stewarts their *Miranda* rights. Thereafter, an attorney allegedly advised them not to file income tax returns because doing so would constitute the making of self-incriminating statements. The Stewarts argue that their Fifth Amendment right to remain silent was violated because their failures to file tax returns were charged as overt acts in the indictment and additionally the failure to file the returns was introduced at trial as evidence of their willfulness in evading taxes.

A taxpayer claiming a Fifth Amendment privilege against the filing of a tax return must specifically claim the privilege "in response to particular questions, not merely in a blanket refusal to furnish any information." *United States v. Saussy*, 802 F.2d 849, 855 (6th Cir. 1986) (quoting *United States v. Johnson*, 577 F.2d 1304, 1311 (5th Cir. 1978)). Further, "taxpayers cannot assert a violation of their rights against

compulsory self-incrimination when they refuse to answer questions on a tax return for fear authorities will discover illegal activity." *United States v. Sturman*, 951 F.2d 1466, 1487 (6th Cir. 1991) (citing *United States v. Sullivan*, 274 U.S. 259, 260 (1927)).

The requirement of filing tax returns was not directed at the Stewarts because they were suspected of criminal activities. Further, the Stewarts did not file any returns and thus did not lodge any particular objections to filing the requisite information. Therefore, they are not protected by the Fifth Amendment privilege. The Stewarts argue, however, that any tax return filed after they were read their *Miranda* rights in 1992 by an IRS investigator would have constituted potential evidence for a criminal prosecution because the IRS had placed a "freeze code" on their accounts. A "freeze code," however, constitutes nothing more than an internal act of the IRS. *See In re Burrow*, 36 B.R. 960, 961 (Bankr. D. Ut. 1984) ("When the IRS received notice of debtors' filing, it placed what it calls a 'freeze code' or 'bankruptcy code' on debtors' account in the IRS computer system. A freeze code prevents the filing of tax liens, the assessment of taxes, the setoff of tax overpayments against tax liabilities, and the issuance of tax refunds.") Therefore, the district court did not err in rejecting the Stewarts' claim.[2]

2. The Stewarts rely upon two Ninth Circuit cases to support their argument that actually contradict their position. In *United States v. Troescher*, 99 F.3d 933 (9th Cir. 1996), the court declined to address the claim: we "need not consider how or in what manner the Fifth Amendment may be invoked as a defense to a prosecution for failure to file tax returns." *Id.* at 935 n. 3 (citing *Sullivan*, 274 U.S. at 263-

(Cont'd)

(Cont'd)

64; *United States v. Rendahl*, 746 F.2d 553, 556 (9th Cir. 1984)). In *Rendahl*, the court explicitly countered the Stewarts' argument in the following discussion:

> In *United States v. Carlson*, 617 F.2d 518 (9th Cir. 1980), the defendant had filed a false W-4 form claiming ninety-nine withholding exemptions, and then did not file a return. As defense to a charge of willful failure to file a return, Carlson claimed that filing a return would have incriminated him for having previously filed the false withholding form. The court found that Carlson would indeed have incriminated himself had he filed a return. 617 F.2d at 520. Nevertheless, it concluded that Carlson had not validly invoked the privilege. The court noted that in cases where the privilege is invoked to avoid incrimination for past tax crimes, the privilege against self-incrimination comes in conflict with the "need for public revenue collection by a process necessarily reliant on self- reporting." 617 F.2d at 521. In such cases, the court must balance these two interests. In *Carlson*, the court concluded that the public interest in raising revenue outweighed Carlson's Fifth Amendment interests. Two factors were significant in the decision. First, Carlson had used the privilege as part of a scheme to avoid payment of taxes—his submission of a false W-4 form was concealed by his failure to file a return, which also enabled him to conceal his overall tax liabilities. Second, the requirement of filing an annual tax return is directed at revenue collection, not criminal prosecution: the questions in the return are neutral and directed at the public at large.

Rendahl, 746 F.2d at 555 (citing *Sullivan*, 274 U.S. at 263-64).

Appendix A

C. *Summary Witness Testimony*

1.

The government called Emily Franxman (Franxman), an IRS employee, to testify as a summary witness. The Stewarts argue that Franxman offered impermissible credibility determinations and legal conclusions and that it was plain error for the district court to admit Franxman's testimony as evidence. Therefore, the Stewarts argue that this court should remand the case to the district court with instructions to strike Franxman's testimony and dismiss the case. A district court's evidentiary rulings are reviewed for an abuse of discretion. *See Morales v. American Honda Motor Company, Inc.*, 151 F.3d 500, 515 (6th Cir. 1998).

Testimony summarizing evidence is admissible in income tax prosecutions. *Sturman*, 951 F.2d at 1480 (citing *United States v. Lattus*, 512 F.2d 352, 353 (6th Cir. 1975)). Such testimony is admissible in a criminal trial "when the judge charges the jury as to all the elements necessary for conviction, where the summary is intended to aid the jury in organizing proof, and where the summary is not inflammatory or prejudicially worded." *Id.*

While a summary witness may give an opinion that "events assumed in [a] question would trigger tax liability[,]" or "whether particular payments under assumed circumstances would be taxable," he or she may not give a legal opinion that necessarily determines the guilt of a defendant or instructs the jury on controlling legal principles. *United States v. Monus*, 128 F.3d 376, 386 (6th Cir. 1997). Therefore, in a tax case, the

summary witness is allowed to "summarize and analyze the facts indicating willful tax evasion so long as [she does] not 'directly embrace the ultimate question of whether [the defendants] did in fact intend to evade income taxes.' " *United States v. Moore*, 997 F.2d 55, 59 (5th Cir. 1993) (quoting *United States v. Dotson*, 817 F.2d 1127, 1132 (5th Cir. 1987)).

The testimony of a summary witness "should be accompanied by a limiting instruction which informs the jury of the summary's purpose and that [the summary itself] does not constitute evidence." *United States v. Paulino*, 935 F.2d 739, 753 (6th Cir. 1991). In *Paulino*, a panel of this court held the testimony of a non-expert summary witness admissible under Fed. R. Evid. 611(a) because the district court gave a limiting instruction and the defense had a full opportunity to cross-examine the witness. *Id.*

The district court instructed to the jury regarding Franxman's testimony as follows:

> This is an opinion witness. Whether she will be able to give an opinion on a certain subject will depend upon what the subject is. She is not an expert. There are no experts in this court. She is an opinion witness. And that's all she will be able to help us with.
>
> * * *
>
> There is a legal definition of net worth that the Court will give you. However, at this time the witness is giving the basis of her opinion for you

> to analyze, and for that purpose she has stated what she believes net worth to be. The definition, the legal definition of net worth will be given to you at a subsequent time in the proceedings. . . . [T]here will be certain summaries testified to in the next several hours. These summaries were prepared by a witness and are submitted to you for the purpose of explaining facts disclosed by testimony and other documents which are legal evidence in the case. Such summaries are not in and of themselves proof of any facts. If such summaries do not correctly reflect facts or figures shown by the legal evidence in the case, then you may disregard them entirely. They are simply to assist you in summarizing what the witness believes the evidence to be.

These instructions included the appropriate limitations by the court and did not present any improper direction. Further, use of Franxman as a summary witness was not error because the defendants cross-examined her extensively. Franxman analyzed the multitude of documents and testimony admitted into evidence and properly testified as to the government's calculation of tax due from the Stewarts. *See United States v. Mohney*, 949 F.2d 1397, 1406 (6th Cir. 1991). She did not render an opinion concerning the guilt of the defendants; she simply calculated the taxes that the Stewarts owed based on the evidence at trial.

The Stewarts also objected to parts of Franxman's testimony. First, the Stewarts argue that she improperly treated a promissory note from Danco to Mrs. Stewart's mother as a personal asset of Mrs. Stewart, and second, she assigned ownership to the Stewarts of property titled in other persons' names. Franxman, however, merely accorded these assets the treatment that the evidence demonstrated they deserved. With respect to the promissory note, trial testimony showed that Mrs. Stewart's mother repaid the loan to Mrs. Stewart rather than Danco. Likewise, the evidence supported Franxman's statement, for tax calculation purposes, that the Stewarts truly owned assets titled in the trusts and other persons.

Finally, the Stewarts also argue that Franxman ignored evidence that, as a matter of Ohio corporate law, Danco had been dissolved in 1992. Franxman partially relied upon Danco transactions, made under the auspices of the trusts, to determine Danco's tax liability. Essentially, the Stewarts contend that this testimony was improper because Danco did not exist as a matter of Ohio state law.

A trust having the attributes of a corporation will be treated for federal income tax purposes as an association and thus cognizable as a taxable entity. "The fact that under state law . . . organizations are not legal entities" is not controlling in determining whether they constituted an association, taxable as a corporation. *Commissioner of Internal Revenue v. Fortney Oil Co.*, 125 F.2d 995, 998 (6th Cir. 1942) (citing *Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U.S. 110, 114

(1925)). "The core test of corporate existence for purposes of federal income taxation is always a matter of federal law." *United States v. McDonald & Eide, Inc.*, 865 F.2d 73, 76 (3rd Cir. 1989). The Stewarts' contentions regarding the treatment of Danco are meritless. The existence of Danco as an association taxable as a corporation for federal tax purposes did not depend upon its status under Ohio law.

D. *Jury Instructions*

In their fourth assignment of error, the Stewarts argue that the district court improperly instructed the jury by failing to include the Stewart's proffered instruction that Danco was dissolved and by administering a confusing instruction regarding opinion witnesses. The Stewarts argue that the district court's refusal to give their proffered instruction and the overall confusion of the jury instructions constituted reversible error. "[The court] review[s] jury instructions as a whole to determine whether they fairly and adequately submitted the issues and applicable law to the jury." *United States v. Williams*, 952 F.2d 1504, 1512 (6th Cir. 1991). A judgment will be reversed "based upon an improper jury instruction 'only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial.' " *United States v. Beaty*, 245 F.3d 617, 621 (6th Cir. 2001).

1.

The Stewarts argue that the district court improperly refused to instruct the jury that Danco was dissolved as a matter of law. The Stewarts proffered the following instruction and its rationale to the district court: "[A]s a

matter of law that the corporation was dissolved. Because corporations are created by—as they're fictitious entities created by the state and ultimately dissolved by the state and we sure have those dissolution papers in the record without any indication of anything that would render those dissolution papers invalid."

As stated in *Williams*, "[a] . . . refusal to deliver a requested instruction is reversible only if that instruction is (1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense." 952 F.2d at 1512. The Stewarts' proffered instruction was wrong. Whether the trusts should be taxed as a corporation was not contingent on whether Danco was dissolved under Ohio law. Rather, it was a question of fact whether Danco and the relevant trusts should be treated as a corporation for tax purposes. The proffered instruction erroneously stated that this issue was resolved as a matter of Ohio law.

2.

The Stewarts' second contention, that the district court delivered confusing instructions regarding opinion witnesses, involves the district court's instruction concerning Franxman. The district court instructed the jury as follows:

OPINION WITNESS AND HYPOTHETICAL QUESTION

> In this case, you have heard the testimony of witnesses who have rendered opinions. Persons

who have experience in any art, science, profession, or calling, may state their opinions in a matter which is relevant to the case. They may also state the reasons for their opinion.

You should consider each opinion received in this case separately and give it such weight as you think it deserves. You may consider the education, training, and experience of the opinion witnesses when determining the weight of their opinions. You may reject the opinion in whole or in part if you conclude the reasons given in support of the opinions are unsound.

Questions have been asked in which opinion witnesses were permitted to assume that certain facts were true and to give their opinions based on those assumptions. You must determine whether the assumed facts, upon which these witnesses base their opinions are true. If any assumed fact was not established by the government by legal evidence beyond a reasonable doubt, you must determine the effect of that fact not being established upon the value of the opinion of the witness.

You may consider the following questions in deciding whether to believe these witnesses and how much to rely on their testimony:

1. What facts did the witness assume? Remember that you must decide which facts

are true based upon the legal evidence in this case.

2. Does the opinion of the witness take into account most or all of the important facts that you decided are true?

3. Does the opinion of the witness adequately explain the important facts that you decided are true?

4. Does the opinion of the witness rely on facts that you decided are false?

Your answers to these questions may suggest reasons to rely on or reject the opinion of the witness.

As with other witnesses, however, you must decide what weight should be given the testimony of each opinion witness. In determining its weight, you may take into consideration the witness's knowledge, experience, education, truthfulness and familiarity with the facts of the case as well as other means of testing credibility and determining the weight to be given to the testimony. In short, you may use all those tests you ordinarily use in everyday life to determine whether an individual is well-informed regarding the matters he or she has talked about.

First, the Stewarts contend that the instruction gave weight to Franxman's testimony as to the legal status of Danco. We disagree, especially since the district court instructed the jury as to the standards for delineating associations taxable as corporations.

The Stewarts argue, somewhat confusingly, that the district court's instruction bewildered the jury because it suggested that the prosecution had a duty to establish beyond a reasonable doubt assumed facts that the defendants had presented in cross-examination. In this argument, the Stewarts referred to the portion of the instruction above that instructs the jury to determine whether assumed facts relied upon by opinion witnesses are true. The Stewarts, however, misinterpret the district court's instruction. Apparently, the district court's reference to "assumed facts" corresponded to the trial evidence relied upon by Franxman in her testimony. Surely, the evidence relied upon by Franxman constituted "assumed facts" because the case had not been submitted to the jury at that juncture. Thus, the prosecution still had the burden of establishing the existence of the "assumed facts" although Franxman relied upon them for her tax calculations.

Finally, the Stewarts argued that the instruction allowed the jury to judge the credibility of Franxman on the same standards as an expert witness. The district court's instruction on "opinion witnesses" largely resembles the Sixth Circuit's model instruction on expert witnesses:

> (1) You have the testimony of _____, an expert witness. An expert witness has special knowledge

> or experience that allows the witness to give an opinion.
>
> (2) You do not have to accept an expert's opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions.
>
> (3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Sixth Circuit Instruction 7.03 Pattern Criminal Jury Instructions, Sixth Circuit District Judges Association (1991).

The Stewarts did not object to the instruction. Therefore, any error is reviewed under the plain error doctrine. *United States v. Busacca*, 863 F.2d 433, 435 (6th Cir. 1988) Although the district court should have given an instruction that opinion testimony was to be judged like any other testimony, notwithstanding an opinion witness's education or experience, failure to do so did not prejudice the defendants and thus did not rise to the level of plain error given that the defendants could have effectively argued to the jury that they did not have to believe the testimony at issue. *See United States v. Mendoza*, 244 F.3d 1037, 1047-48 (9th Cir. 2001). Therefore, because the sum of the district court's instructions set forth the requisite guidance to the jury, we decline to conclude that the instructions as a whole were "confusing, misleading, or prejudicial." *Beaty*, 245 F.3d at 621.

Appendix A

E. *Net Worth Calculation*

In their sixth assignment of error, the Stewarts contend that the prosecution's calculation of their net worth during the contested years was erroneous.

Title 26 U.S.C. § 7201 provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony. . . ." "There are two methods of proof in a tax case. In the 'direct' or 'specific item' method, specific items are demonstrated as the source of unreported income. In the 'indirect' method, the defendant's finances are reconstructed via circumstantial evidence including (1) net worth analysis; (2) bank deposits; and (3) cash expenditures in excess of reported income." *United States v. Hart*, 70 F.3d 854, 860 n. 8 (6th Cir. 1995). Under the net worth method, the government attempts to establish an "opening net worth," or rather total net value (excess of assets at cost over liabilities) of the taxpayer's wealth at the beginning of a given year. Then, it determines increases in the taxpayer's net worth and adds nondeductible expenditures incurred during the year. The difference between the adjusted net values at the beginning and end of the year is treated as the taxable income received during the year. The government must rule out the existence of nontaxable funds as the source of expenditures or increases in net worth. *See Holland v. United States*, 348 U.S. 121, 125 (1954); *United States v. Giacalone*, 574 F.2d 328, 330 (6th Cir. 1978).

In "indirect method" cases, "the evidence of guilt is largely circumstantial, and the net worth method is, at best,

only an approximation." *Giacalone*, 574 F.2d at 332. The net worth method is "so fraught with danger for the innocent that the courts must closely scrutinize its use." *Holland*, 348 U.S. at 125. Thus, opening net worth must be established with "reasonable certainty." *Id.* at 132. "As an added measure of protection the government is required to demonstrate that it has investigated the existence of sources of net worth other than unreported taxable income." *Giacalone*, 574 F.2d at 332. Failure to investigate leads furnished by the taxpayer may result in "serious injustice," *Holland*, 348 U.S. at 135, and thus the "cogency of [the government's] proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt." *Id.* "However, where the government proves a source of taxable income, it need not negate all the possible nontaxable sources of the alleged net worth increases, such as gifts, loans, and inheritances. Proof of a source of taxable income carries with it the negation of untaxable income." *United States v. Bencs*, 28 F.3d 555, 563 (6th Cir. 1994).

The Stewarts argue that the government improperly calculated their net worth because it failed to treat the assets of Danco as those of a sole proprietorship. The discussion above regarding Danco's status as a dissolved corporation, particularly with respect to federal tax law, disposes of this argument.

Next, the Stewarts argue that the government failed to establish opening cash on hand with reasonable certainty because it failed to investigate leads provided by them. "A defense often asserted in net worth cases is that the government's opening net worth is not accurate because of

substantial cash or assets on hand at the starting point." *Bencs*, 28 F.3d at 563. The existence of a cash hoard may be refuted, however, by "[e]vidence which carefully traces the financial history of a defendant and discloses expenditures in excess of reported resources in the period immediately preceding the indictment years." *Giacalone*, 574 F.2d at 332. Furthermore, the "recognition of a cash bankroll treated as a constant, together with proof which would support a finding that no significant cash hoard existed, [is] a sufficient accounting for cash in the opening net worth computation." *Giacalone*, 574 F.2d at 333. Therefore, the establishment of requisite proof permits the "use of dashes" to represent "cash" for contested years; such symbolic denominations "[do] not invalidate the net worth statement." *Id.* at 332.

Franxman presented the Stewarts' cash assets as a dash, and thus constant, for the contested years. She relied upon various factors to conclude that the Stewarts did not have a cash hoard at the close of 1990, including: 1) evidence of loans of $15,000, $35,000, and $30,000, in 1989, 1990, and 1991, respectively, that suggest the lack of a cash hoard; 2) evidence that checks written on personal accounts did not reveal the purchase of any income-producing assets or investments; 3) and the lack of evidence to support that the Stewarts had a history of engaging in large cash transactions. On cross- examination, Mr. Stewart's attorney suggested the existence of cash items totaling $62,485, but the Stewarts acknowledged in their brief on appeal that they could not provide any leads for the items. In any event, Franxman properly disposed of these suggestions.

The Stewarts also claimed additional errors in the government's net worth calculation, specifically directing this court to several missed assets: $60,000 in household furniture; the $10,000 value of a $600,000 life insurance policy; and $22,566 in loans the Stewarts allegedly made to Danco. As set forth by the government, though, there was no evidence that the Stewarts disposed of the furniture during the contested years, so its value remained constant during the period. The Stewarts claim that the furniture constituted an asset because insurance proceeds covered destruction of the furniture during a fire, but the evidence showed that proceeds from the insurance settlement check primarily went to a contractor to clean smoke damage, not to buy new furniture. The Stewarts did not elicit any evidence that they disposed of the life insurance policy or borrowed against it, and they did not demonstrate that their loans to Danco were repaid or became worthless. The Stewarts also argued that the government improperly included Danco's $50,000 loan to Mrs. Stewart's mother as an asset, but, as mentioned above, one may properly disregard this argument because evidence revealed that the mother repayed the loan to Mrs. Stewart rather than to Danco. Accordingly, the Stewarts' arguments regarding net worth are meritless.

F. *Insufficient Evidence of Conspiracy Count*

Sabino argues that his conviction should be reversed because there was insufficient evidence to find him guilty on the conspiracy count. In particular, Sabino argues that there was no evidence that he perpetrated any deceitful or dishonest acts, that he conspired with other persons who committed deceitful or dishonest acts, or that he had

knowledge of tax laws pertaining to the trusts for which he was trustee. "Evidence is sufficient to uphold a jury conviction if after viewing the evidence in the light most favorable to the government and drawing all inferences in the government's favor, a reasonable juror could find that each element of the offense has been established beyond a reasonable doubt." *United States v. Kraig*, 99 F.3d 1361, 1368 (6th Cir. 1996) (citing *United States v. Taylor*, 13 F.3d 986, 991 (6th Cir. 1994)).

Sabino was convicted of conspiring to defraud the IRS under 18 U.S.C. § 371. According to § 371, "[i]f two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined. . . ." 18 U.S.C. § 371. The elements of a § 371 conspiracy are:

> "(1) the conspiracy described in the indictment was wilfully formed, and was existing at or about the time alleged; (2) . . . the accused willfully became a member of the conspiracy; (3) . . . one of the conspirators thereafter knowingly committed at least one overt act charged in the indictment at or about the time and place alleged; and (4) . . . such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged."

Kraig, 99 F.3d at 1368 (citing *United States v. Sturman*, 951 F.2d 1466, 1474 (6th Cir. 1991)). Although § 371 is broadly construed, "[i]t is fundamental that a conviction for

conspiracy under 18 U.S.C. § 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.' " *United States v. Collins*, 78 F.3d 1021, 1037 (6th Cir. 1996) (quoting *Ingram v. United States*, 360 U.S. 672, 677-78 (1959)). "[T]he government need not prove a formal agreement—a tacit or mutual understanding to engage in a common plan is sufficient." *Id.* (citing *United States v. Ellzey*, 874 F.2d 324, 328 (6th Cir. 1989)). Further, "[t]he agreement may be inferred from the acts done in furtherance of the conspiracy." *United States v. Hitow*, 889 F.2d 1573, 1577 (6th Cir. 1989). Once the government proves that a conspiracy existed, the defendant's "connection to the conspiracy must be shown beyond a reasonable doubt, but the importance of the connection need not be great." *United States v. Betancourt*, 838 F.2d 168, 174 (6th Cir. 1988).

The government must show that the conspirators intended to impair the functions of the IRS. While the government need not "prove that the conspirators were aware of the criminality of their objective," it must "show that they knew of the liability for federal taxes." *Collins*, 78 F.3d at 1037.

There was ample evidence at trial to sustain the conviction of Sabino for conspiracy. The Stewarts were the primary players in the tax evasion scheme. Yet Sabino served as trustee for some of the trusts and in his capacity facilitated transfers of the Stewarts' interests to the trusts. His signature authorized the payment of the Stewarts' living expenses and mortgages, and he acted as the "manager" for Danco although he did not have any substantive responsibilities. Sabino also testified falsely to the grand jury concerning various

transactions conducted on behalf of the trusts. In addition, trial testimony showed that Sabino gave a brief presentation at a PCS meeting attended by Mrs. Stewart. There was substantial evidence for the jury to conclude that Sabino willfully participated in the conspiracy.

G. *Sentencing Determinations*

1. *Minor Role Reduction: Sabino*

The government argues that the district court erred in granting Sabino a reduction in his offense level for serving as a minor participant in the conspiracy. The Sentencing Guidelines provide that a sentencing court should decrease an offense level by 2 levels if a defendant is a minor participant in a criminal offense. U.S.S.G. § 3B1.2 (1998). The district court's reduction of an offense level under this guideline is reviewed for clear error. *See United States v. Latouf*, 132 F.3d 320, 332 (6th Cir. 1997) (citing *United States v. Miller*, 56 F.3d 719, 720 (6th Cir. 1995)). The defendant bears the burden of proof in establishing his entitlement to the reduction. *See id.* " 'An adjustment is not appropriate in the absence of a finding that the defendant was 'substantially less culpable than the average participant' in the criminal enterprise.' " *Id.* (quoting *Miller*, 56 F.3d at 720). "A defendant whose participation is indispensable to the carrying out of the plan is not entitled to a role reduction." *Id.* (citation omitted).

The government lists several acts of Sabino that it submits comprised more than a minor role in the conspiracy, specifically his conduct in serving as a trustee for several of

the trusts; signing or having his signature stamped on a contract for the purchase of property on behalf of the Stewarts; having his signature stamped on a trust banking account that benefitted the Stewarts; and participating in the placement of a bogus mortgage on the Stewarts' residence. Sabino argues that he contributed no special knowledge or skills that were essential to the completion of the conspiracy. However, Sabino's willful conduct as a trustee of the trusts, in permitting the Stewarts to use his signature stamp, securing property for the Stewarts, and creating a bogus mortgage were essential to the operation of the conspiracy. Therefore, we find that Sabino's actions as trustee were indispensable to the conspiracy and the district court's reduction in his offense level was clearly erroneous.

2. *Sophisticated Concealment Enhancement: the Stewarts and Sabino*

The government argues that the district court should have increased the defendants' offense levels for utilizing sophisticated means to conceal the conspiracy under U.S.S.G. § 2T1.1. On appeal, the district court's determination concerning the applicability of this guideline section is reviewed for clear error. *United States v. Kraig*, 99 F.3d 1361, 1371 (6th Cir. 1996). However, the application of the guideline to a particular set of facts is reviewed *de novo*. *See United States v. Pierce*, 17 F.3d 146, 151 (6th Cir. 1994).

The 1998 edition of the Sentencing Guidelines states: "[i]f the offense involved sophisticated concealment, increase

by 2 levels." U.S.S.G. § 2T1.1(b)(2).[3] Application note 4 states: " 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment." U.S.S.G. § 2T1.1 cmt. 4.

The sophisticated concealment enhancement is applied to a defendant "based on the overall offense conduct for which the defendant is accountable" according to the "usual relevant conduct rules." U.S.S.G. Supplement to Appendix C, Amendment 577 at 6 (1998). The relevant conduct guideline provides that "[i]n the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" are used to set a defendant's offense level. U.S.S.G. § 1B1.3(a)(1)(B).

Complex schemes of tax evasion warrant imposition of the sophisticated concealment enhancement. In *United States v. Morris*, No. 99-3905, 2001 WL 92126 (6th Cir. Jan. 23, 2001), a panel of this court affirmed the application of the "sophisticated means"[4] enhancement to the defendant's offense level, noting

3. The pre-sentence report and the government's brief, however, refer to sophisticated *means*, and the government's brief cites to the 1995 edition of the Guidelines manual in discussing this issue. The Sentencing Guidelines "in effect on the date that the defendant is sentenced" are applied. U.S.S.G. § 1B1.11. Therefore, the 1998 edition of the Sentencing Guidelines is applicable.

4. Explanatory notes to the amendment explain that the language of the enhancement for "sophisticated means" in the 1995 edition of (Cont'd)

the defendant's acknowledgment that he used two nominee trusts to conceal his income and assets. The panel stated that "*the use of nominee trusts constitutes a sophisticated means to conceal tax evasion offenses.*" *Id.* at *3 (emphasis added) (citing *United States v. Minneman*, 143 F.3d 274, 283 (7th Cir. 1998)).

Similarly, in *United States v. Spine*, No. 99-3808, 2000 WL 761881 (6th Cir. May 30, 2000), a panel of this court affirmed the application of the "sophisticated means" enhancement to the offense level of defendant, stating:

> [The defendant] prepared the 1041 forms to indicate that [a corporation's] income was distributed offshore to an entity that did not exist. He attached Schedule C forms that should have been attached to the 1040 forms to the 1041 forms. He was a signatory on one of the trust accounts he knew to be a sham, and received $2,375 from one of the accounts. The IRS had to summons bank records from approximately six banks over the course of several months in order to trace the money [the defendant] helped to hide. The investigating IRS agent testified that setting up the tax avoidance scheme required sophistication, and that it required a more complex investigation than that necessary for a false entry on a 1040 form.

Id. at *4 (citing *United States v. Pierce*, 17 F.3d 146, 151 (6th Cir. 1994)).

(Cont'd)

the Sentencing Guidelines is "essentially equivalent" to the language of the enhancement for "sophisticated enhancement." U.S.S.G. Supplement to Appendix C, Amendment 577 at 6 (1998).

Appendix A

a. *As applied to the Stewarts*

The district court erred in failing to apply the sophisticated concealment enhancement to the Stewarts. The district court noted the "monumental work" that the IRS special agent engaged in to present the case for trial, but it declined to apply the enhancement for the following reasons:

> "[T]his Court cannot find by a preponderance of the evidence that this is a sophisticated scheme. It is so typical of a scheme that was originated by this Pilot Connection. As Mr. Dickstein [Mr. Stewart's counsel] has pointed out . . . it's a tax protestor case; that it's the relationship between these taxpayers and the government was always straightforward and that they did make slips in that relationship. But basically the situation as I found it and as I listened to the trial, even though the case was complex, even though the case was many, many exhibits, that for the purpose of sentencing I agree with the analysis that this, quote, is a run-of-the-mill of a tax case even though it is extremely complex, time consuming, and I think even the time we've spent on the sentencing issues demonstrates its complexity and the need with the case-and the time the case needed to properly be presented.
>
> So I would tentatively rule that I would not enhance the offense level by the two points suggested that this was sophisticated, realizing

> that in this case the Stewarts controlled the entities; that the Stewarts conducted the business; and that the business was conducted in an open and straightforward manner as far as I can tell at all times. The checks were deposited as far as I can tell. And I would conclude that the enhancement for sophisticated means in this case is not appropriate."

In a subsequent statement, the district court remarked, with respect to the conspiracy, "[t]here were no offshore bank accounts[,][t]here were no aliases used[,][t]here were no fictitious names used."

Because of the complexity of the circumstances of this case, in which numerous banks and lenders were called to testify, and the fact that the defendants used at least seven trusts to evade the payment of taxes, we hold that the district court abused its discretion in failing to apply the sophisticated concealment enhancement to the Stewarts.

b. *As applied to Sabino*

Sabino acted as trustee for several of the trusts used by the Stewarts. He permitted the Stewarts to use his signature stamp to deposit money into banking accounts to use as funds for their personal expenses. Sabino participated in the acquisition of property for the Stewarts so as to conceal their ownership interests. Sabino also participated in the placement of a bogus mortgage on the Stewarts' residence. These actions establish that Sabino was intimately involved in the operation of the trusts and in the conspiracy. His actions enabled the

Stewarts to maintain the trusts and to evade the IRS. Accordingly, the sophisticated concealment enhancement is applicable to Sabino based on his participation in the conspiracy. Further, the Stewarts' actions in connection with the trusts were reasonably foreseeable acts in furtherance of the conspiracy in accordance with the relevant conduct rules. *See* U.S.S.G. Supplement to Appendix C, Amendment 577 at 6 (1998); U.S.S.G. § 1B1.3(a)(1)(B).

The complexity of the case and the use of the seven trusts in the tax evasion conspiracy constitutes sophisticated concealment. Therefore, the district court abused its discretion in failing to apply the sophisticated concealment enhancement to Sabino.

3. *Obstruction of Justice Enhancement*

The government argues that the district court's failure to apply an obstruction of justice enhancement to Sabino's and Mrs. Stewart's offense levels constituted error. The Sentencing Guidelines provide that "[i]f [a] defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense . . . increase the offense level by 2 levels." U.S.S.G. § 3C1.1 (1998). On appeal, a district court's legal interpretation of the Sentencing Guidelines provisions is reviewed *de novo*. *United States v. Jones*, 107 F.3d 1147, 1161 (6th Cir. 1997). On appeal, however, we may not reject the district court's factual findings unless they are clearly erroneous. *United States v. Pruitt*, 156 F.3d 638, 647 (6th Cir. 1998).

Appendix A

The government argues that Sabino's and Mrs. Stewart's sentences should have been enhanced due to false testimony they gave in grand jury proceedings. As observed by the government, a sentencing court must apply the enhancement if a defendant provides a materially false statement to a grand jury. *See United States v. Mahaffey*, 53 F.3d 128, 133-34 (6th Cir. 1995). The government argues that the district court declined to apply § 3C1.1 in part because it erroneously determined that obstruction of the lawful operation of the United States is the essence of a § 371 conspiracy; and, therefore, the obstruction of justice is included in the consideration of the guidelines. The government also argues that the district court erred in finding that Sabino's and Mrs. Stewart's false statements before the grand jury were not material misrepresentations.

The § 3C1.1 enhancement is applicable to § 371 conspiracies. Commentary to § 3C1.1 provides that the enhancement will not apply to persons convicted of "Contempt," "Obstruction of Justice," "Perjury or Subornation of Perjury; Bribery of Witness," "Failure to Appear by Defendant," "Payment to Witness," "Accessory After the Fact," or "Misprision of Felony," unless "a significant further obstruction occurred during the investigation, prosecution, or sentencing of the prosecution for the obstruction offense." *See id.* § 3C1.1 cmt. n. 6 (1995). By logical extension of Comment 6, the Sentencing Guidelines do not prohibit application of the § 3C1.1 obstruction enhancement to a § 371 conspiracy. If "further" obstructive conduct may lead to an enhancement of the intrinsic obstruction offenses listed in Comment 6, surely the enhancement may be applied as punishment for

obstructive conduct committed after the termination of a § 371 conspiracy. *See United States v. Furkin*, 119 F.3d 1276, 1285 (7th Cir. 1997).

A panel of this court has signaled that a sentencing court may not apply the § 3C1.1 enhancement if the application entails double-counting, i.e., where the obstructive conduct is "part and parcel" of the underlying offense of conviction. *See United States v. Blandford*, 33 F.3d 685, 710 n. 27 (6th Cir. 1994) (rejecting double-counting argument by noting that defendant uttered a material false statement during pre-trial investigation *and* during trial testimony, thus constituting "separate incidents occurring at separate times"); *see also United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991) ("Section 3C1.1 does not apply to conduct that is part of the crime itself.") (citing *United States v. Werlinger*, 894 F.2d 1015, 1017-19 (8th Cir. 1990)); *United States v. Ransom*, 9 F.3d 707, 708 (8th Cir. 1993) (per curiam) (same); *c.f.*, *United States v. Fredette*, 15 F.3d 272, 275-76 (2d Cir. 1994) (applying § 3C1.1 enhancement for additional obstructive conduct committed after underlying offense); *United States v. Agoro*, 996 F.2d 1288, 1292-93 (1st Cir. 1993) (same); *United States v. Lueddeke*, 908 F.2d 230, 234-35 (7th Cir. 1990) (same).

Analysis of the trial court record establishes that imposing a § 3C1.1 enhancement in this case would constitute double-counting. In arguing for application of the enhancement to Sabino and Mrs. Stewart, the government relies upon "Sabino's testimony that the Stewarts had no interest in the Redna Terrace Property and that he had never discussed the Stewarts' business affairs with Sam Spine,"

and Mrs. Stewart's false testimony to the grand jury that she did not know Sam Spine.[5] The superceding indictment, however, lists false testimony to the grand jury as an overt act in furtherance of the conspiracy. That the government treated the conduct before the grand jury as a part of the conspiracy is reflected in the observation that the original indictment, which did not incorporate a conspiracy charge, did not mention any false testimony before the grand jury. The government called the grand jury reporter as a witness at trial to read the portions of the grand jury testimony that contained the false testimony. Surely, the jury, with copy of the superceding indictment in hand, could have determined that the statements were 'part and parcel' of the conspiracy. We find, therefore, that the district court did not err in failing to enhance Sabino and Mrs. Stewart's sentences for obstruction of justice.

4. *Downward Departure: Sabino*

In its final assignment of error, the government argues that the district court erred in granting Sabino a downward departure on his sentence. A sentencing court may depart downward from a sentencing range when there is a mitigating factor that has not been adequately considered in formulating the Sentencing Guidelines. 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0. A sentencing court's decision to depart downward is reviewed for an abuse of discretion. *See Koon v. United States*, 518 U.S. 81, 92 (1996). Whether a stated ground for departure is a permissible basis is a question of law reviewable *de novo*. *See id.* at 98.

5. *See* Final brief of the Appellee/Cross-Appellant, filed June 25, 2001, at 39, 41.

Before a departure is authorized, the sentencing court must deem the circumstances of the case sufficiently atypical and outside the heartland of cases. *See id.* at 98. To determine whether a factor which takes a case outside the heartland should result in a different sentence, a district court must first decide whether the factor is forbidden, encouraged, discouraged, or unaddressed by the guidelines as a potential basis for departure. *See id.* If a factor is forbidden, a sentencing court abuses its discretion in using it to depart from the Sentencing Guidelines. *See id.* If a factor is encouraged, a sentencing court may depart if the Sentencing Guidelines do not already take that factor into account. *See id.* If a factor is discouraged, or is an encouraged factor already considered by the Sentencing Guidelines, a sentencing court may depart only "if the factor is present to an exceptional degree or in some other way makes the case distinguishable from an ordinary case where the factor is present." *Id.* Finally, a district court may depart on the basis of a factor not addressed by the Sentencing Commission if it finds, "after considering the structure and theory of relevant individual guidelines and the [Sentencing] Guidelines taken as a whole," that the factor takes the case out of the applicable guideline's heartland. *Id.* at 94. A district court departing on the basis of an unenumerated factor, however, should "bear in mind the Commission's expectation that [such] departures . . . will be 'highly infrequent.' " *Id.* at 96 (quoting U.S.S.G. ch. 1, pt. A.).

As a panel of this court has said, the Guidelines "explicitly acknowledge that a combination or aggregation of factors could distinguish a case from the 'heartland' of cases." *United States v. Coleman*, 188 F.3d 354, 361 (6th

Cir. 1999) (en banc) (citing U.S.S.G. § 5K2.0 cmt.)[6] Thus, a sentencing court is "required to consider the particular factors of [a] case as a whole, and any combination thereof, in determining whether there were sufficient extraordinary factors to take [a defendant's] case out of the 'heartland' of . . . cases." *Id.* at 362. However, a departure must be "reasonable in terms of the amount and the extent of the departure in light of the reasons for the departure. . . . In other words . . . the reasons [must] justify the magnitude of the departure." *United States v. Tocco*, 200 F.3d 401, 432 (6th Cir. 2000) (citing *United States v. Crouse*, 145 F.3d 786, 789 (6th Cir. 1998)).

The district court downward departed on Sabino's offense level by three levels so as to sentence him to probation.[7] The district court buttressed its departure based

6. The commentary to U.S.S.G. § 5K2.0 provides:

> The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances [not ordinarily relevant to a departure], differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

7. A sentencing court may grant a defendant probation under § 5B1.1. Without this departure, at the time of his sentence, Sabino was at level 13. Given our findings that Sabino was not entitled to a reduction in offense level for minor role and should have had his offense level enhanced for sophisticated means, Sabino's offense level is 17 without the departure at issue.

on the totality of the following circumstances: the death of Sabino's wife a few months before sentencing; Sabino's age (72) at the time of sentencing; his physical deficiencies and condition, particularly ailments with his eyes and ears; the absence of any physical threat to others; the absence of a risk of flight; and the conclusion that Sabino played a minor role in the conspiracy. The district court noted that this occasion was the second time since 1987 that it had downward departed in a case. The government cites *Tocco* to support its argument for reversal of the district court's determination. In *Tocco*, however, the court reversed a *ten-level* departure based upon the totality of the following circumstances: the defendant's overwhelming community service and support; the defendant's age and debilitating health; and the defendant's wife's poor health. *Tocco*, 200 F.3d at 432. By analogy, the district court in the case at bar departed only three levels *with* the inclusion of more factors. Although most of the factors in the case at bar do not ordinarily warrant a departure, the district court concluded that their confluence compelled a departure. Due to the relative small departure, we find that the district court did not abuse its discretion in the departing downward of Sabino's offense level by three levels.

III. *CONCLUSION*

For the reasons stated above, we find there is no basis on which to reverse the defendants' convictions or the majority of the district court's sentencing determinations. However, we find that the district court erred in failing to enhance each of the defendant's offense level for engaging in "sophisticated means," and in reducing Sabino's offense level for minor role. Therefore, the judgment of the district court is AFFIRMED in part and REVERSED in part, and REMANDED for re-sentencing consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED AND FILED JUNE 3, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CR-1-96-46-01
CR-1-96-46-02
CR-1-96-46-03

UNITED STATES OF AMERICA,

Plaintiff

v.

DANIEL K. STEWART,
DONNA G. STEWART,
JOE SABINO,

Defendants

ORDER

This matter is before the Court upon the Motion to Dismiss Pursuant to 18 U.S.C. 3161 filed by defendant Daniel K. Stewart (doc. no. 158) joined in by defendants Donna G. Stewart (doc. no. 159) and Joe Sabino (doc. no. 163), the government's Response (doc. no. 164), the government's Time Line Regarding Defendant's Speedy Trial Act Motion (doc. no. 198), and the defendants' Response thereto (doc. no. 202).

Appendix B

The defendants move the Court for an order of dismissal with prejudice claiming that more than 70 non-excludable days elapsed in the case between the filing of the indictment and the beginning of the trial on July 7, 1998. The defendants' only requested sanction is the dismissal of the Superseding Indictment with prejudice. The government argues that the Speedy Trial Act was not violated and the Motion should be denied.

According to the defendants' original calculations, on April 2, 1996, an Indictment was returned against defendants Daniel and Donna Stewart. It was not until May 20, 1996, however, that the defendants were arraigned but the Speedy trial clock did not begin to run at that time because a Motion to Dismiss was filed on that day. The defendants recognize that this motion was not withdrawn on October 31, 1996 and therefore this and numerous other motions pending tolled the time until then. According to defendants, October 31, 1996, however, still is not the starting date for the computation of Speedy Trial seventy-day period of time. The defendants recognize that some motions remained pending after the hearing and are subject to § 3161(h)(1)(J) which provides for excluding the time of any "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court". The defendants believe that the motions remaining fell into two categories: those that the Court took under advisement immediately and those which were held in abeyance until the government submitted additional information requested by the Court during the hearing. They claim that the motions not fully disposed of by the Court during the Hearing on October 31,

1996 and by the order that followed on November 7, 1996 were subject to this section in that they should have been decided either thirty days from then or thirty days from the date all additional information was submitted to the court. They claim that this later date was 1997. The defendants assert that the government unreasonably delayed filing these materials, but concede that the time is tolled until March 23, 1997 which was thirty days after the receipt of the materials by the Court. The defendants contend that from then until November 11, 1997 inclusive, 233 days accumulated on the Speedy Trial clock. They believe the time was tolled while the government's motion filed November 12, 1997 was pending, after which additional time accumulated of 86 days, resulting in an accumulation of 319 days of non-excludable Speedy Trial time as of February 6, 1998. A motion filed by the government on February 6, 1998 was ruled upon by the Court on February 23, 1998. Defendants argue that an additional 48 days elapsed from February 23, 1998 until April 16, 1998. The defendants allow for the tolling of one day, April 16, 1998, but claim another 49 days accumulated as of the date of the filing of the motion now under consideration from April 16, 1998 to June 5, 1998 for a grand total of 415 days.

In a subsequent pleading, the defendants concluded that two calculations were incorrect. The tolling of the speedy trial time ended April 3, 1997 (not March 24, 1997) and the time from the filing of a motion by the government on April 16, 1998 and its disposition on June 6, 1998 is excludable. Their final claim is that there were 356 non-excludable days. Thus, they believe they met their burden of establishing a prima facie case that the government violated the Speedy Trial Act.

Appendix B

The government contends that the speedy trial clock may have run between February 26, 1998 and April 16, 1998 for a total of only 49 days. It argues that defendants Daniel and Donna Stewart were arraigned on the original Indictment on May 20, 1996, but filed motions the same day. On May 29, 1996, the defendants asked for a continuance of the trial date. The Court continued the case pursuant to § 3161(h)(1)(A) and (B). On July 22, 1996, all defendants were arraigned on the Superseding Indictment. The Magistrate Judge granted the defendants' request to have their outstanding motions applied to the superseding indictment. The government and the defendants agree that motions were pending until March 24, 1997, but the government claims that from February 21, 1997 through February 28, 1998 is excludable based on its assertion that the Court directed defendant Sabino to review the jury venire selection materials at the February, 1997 meeting and requested additional information on the defendants' motions for Bill of Particulars at the April meeting.

The Speedy Trial Act provides that defendants must be brought to trial within a seventy-day period subject to exclusions. A determination of the issues raised in this Motion involves the application of the following sections of the Speedy Trial Act, Title 18, United States Code, § 3161:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

Appendix B

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to-

> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
>
> (J) permits a delay attributable to the period during which a defendant's motion is actually under advisement by the court, which excludable time may not exceed 30 days;

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

An Indictment was filed on April 2, 1996 naming Daniel and Donna Stewart. The defendants were arraigned by the Magistrate Judge and appeared for a first conference before this Court on May 29, 1996. During this conference, the local attorney asserted that it was a complex case. This Court agreed. The case was continued pursuant to § 3161(h)(8)(A) and (B). The Court specifically found and held the 70-day trial rule did not apply to these proceedings because it was a complex case.

On June 19, 1996 a Superseding Indictment was filed adding Joe Sabino as a defendant. Between May 20, 1996 and September 30, 1996, the defendants filed an additional twenty-six motions.

A Hearing was held all day on October 31, 1996. The first subject discussed on the record that day was the complex nature of the case. The government and two of the three defense attorneys asserted on the record that it was a

complex case; the third defense attorney voiced no opinion on the issue or objection to such a finding. Pursuant to the record established during that Hearing, the Court ordered the following:

The Government was ordered to provide a transcript of the Grand Jury proceedings which had resulted in the issuance of the Superseding Indictment. The defendants' Motions to Inspect Grand Jury List were held in abeyance pending an *in camera* review by the Court of the Grand Jury transcripts. Defendant Sabino's Motion for Exculpatory Evidence was taken under advisement and his Motion for Leave to file Reply was granted. Defendants' Motions for a Bill of Particulars were taken under advisement. The Government advised that it would use the "net worth" method and agreed to file additional information pertaining to the requests of defendants in the form of summaries of the proof it would offer against defendants. The defendants' Motions to Dismiss were taken under advisement. The government agreed to provide to the Court additional information in the form of the indictments, to the extent they were available to the Government, filed in the cases discussed on the record in connection with the Motions to Dismiss. The Government's Motion to Revoke defendant Sabino's Bond was discussed and denied. The following motions were withdrawn: Motions to Dismiss filed by defendants Daniel Stewart and Donna Stewart, defendant Donna Stewart's Motion to Compel Discovery and Motion for Exculpatory Evidence; defendant Joe Sabino's memorandum in support, and Motion to Extend Time to Secure Counsel. The Motion to Withdraw as Attorney for defendant Joe Sabino was withdrawn in open court subject to the record established during a conference in chambers.

Appendix B

The following motions were rendered moot and denied: Defendant Sabino's Motion for Order regarding the Magistrate Judge's Order based on the finding that defendant qualifies pursuant to 28 U.S.C. § 1915.

Pursuant to the record established during the Hearing, the following motions were granted: defendant Donna Stewart's Motion for Joinder in Motions filed by other defendants; defendant Daniel Stewart's Motion for Joinder in Motions filed by codefendants; defendant Joe Sabino's memorandum in support of other defendants' Motions to Dismiss and Motion to Proceed in forma pauperis. Pursuant to the record, defendant Joe Sabino's Objections to Arraignment was granted. The Court vacated Joe Sabino's arraignment held on July 22, 1996 and proceeded to arraign the defendant in open court. Defendant Sabino waived his right to a reading of the Superseding Indictment and entered a plea of Not Guilty to the Superseding Indictment. The Notice and Demand and Motion to Strike Government's Response thereto were thereby rendered moot and denied. The Motion to Stay was denied.

Defendant Joe Sabino's Motions to Extend Trial Date and Motion for Enlargement of Time were granted. The Court again declared this case to be complex litigation. Future status conferences were established pursuant to a separate Scheduling Order. Defendant Joe Sabino's Motion in Limine was granted in part and denied in part.

The government submitted part of the grand jury transcripts on December 20, 1996. The first status conference was held on February 21, 1997, at which time the government

submitted the remainder of the grand jury transcripts. A second status conference was held on April 2, 1997. At this time, it was necessary for the Court to review the additional information which had been submitted in order for the Court to decide the nine major motions still pending. On September 3, 1997, the Court ruled on the Motions to Dismiss. On October 24, 1997, the Court filed decisions on the five Motions for Bills of Particulars, granting them in part and denying them in part, and ordering the government to disclose a substantial amount of information. Time was required to provide the information. This information was filed on December 12, 1997. Several motions were filed during this time. A Notice of Tax Protestor Evidence was filed by the government on January 28, 1998. A status conference was held on February 24, 1998 at which time the case was set for pretrial/status conference on June 3, 1998 and trial on July 7, 1998 by agreement of all parties. The present motion was filed on June 2, 1998 along with numerous other pretrial motions. The case was tried to a jury. A verdict was returned on September 14, 1998. All defendants were convicted of the conspiracy count. Donna Stewart was convicted on all tax counts; Daniel Stewart was convicted of three tax counts, but was acquitted on one substantive tax count.

Speedy Trial Act, 18 U.S.C. 3161

Pursuant to *United States v. Jenkins*, 92 F.3d 430, 438 (6th Cir.1996), *cert. denied*, 520 U.S. 1170 (1997), all a defendant is required to do to claim his rights to a speedy trial is file a motion in which he establishes a *prima facie* case that the government violated the Speedy Trial Act. Once

the *prima facie* case has been established, the burden falls on the government to prove excludable time by a preponderance of the evidence.

The United States Court of Appeals for the Sixth Circuit has stressed the need for judicial officers handling criminal cases to follow the requirements of the Speedy Trial Act. *United States v. White*, 985 F.2d 271, 275 (6th Cir.1993). The Court noted that § 3161(h)(8)(A) offers wide latitude to the judge to respond to the needs of individual cases. *Id.* Quoting from *United States v. Perez-Reveles*, 715 F.2d 1348 (1983), the Court reminds us that the "interests of justice" exception requires the court to place on the record the reasons for granting the delay. *Id.*

> The Sixth Circuit has stressed that a continuance should not be granted lightly. *United States v. Nance*, 666 F.2d 353, 356 (9th Cir.), *cert. denied sub nom. Lee v. United States*, 456 U.S. 918, 102 S.Ct. 1776, 72 L.Ed.2d 179 (1982). The district court must set forth the reasoning supporting the determination that the interests served by the grant of the continuance outweigh the defendant's and the public's interest in a speedy trial. *Cianciola*, 920 F.2d at 1299. The reasons for the grant of continuance must be set forth in the record, either orally or in writing. *Id.* Although the court is not required to state findings at the time that the continuance is granted, the findings "must actually have been the factors motivating [its] decision to grant the continuance." *United States v. Crane*, 776 F.2d

> 600, 606 (6th Cir.1985). Therefore, the court is allowed to state the reasoning later in an order denying the motion to dismiss the charges, but the reasons stated must be the actual reasons that motivated the court at the time the continuance was granted.

United States v. Crawford, 982 F.2d 199, 204 (6th Cir.1993).

The Court notes that the defendant in *Crawford* filed a motion to dismiss four days after the Court set the trial date. In the case under consideration, the Court set the trial date at a conference on February 24, 1998 and the defendants did not file the Motion to Dismiss until June 2, 1998.

Consent to a delay waives any subsequent objections. *United v. Monroe*, 833 F.2d 95 (6th Cir.1987)

The Court agrees with the defendants that several methods for calculating excludable time are involved in the Court's consideration of this case under Title 18 U.S.C. § 3161.

First of all, the government's assertion that the case was found to be complex comports with the Court's view of the case and, in fact, guided the Court's view of the case and the procedures followed during the entire pendency of the case up to the time of trial. The issue was discussed as early as the first conference on May 29, 1996 and memorialized in the first Order continuing the trial date pursuant to subsections (8)(A) and (B). Although defendants argue that the continuance was based on a decision to allow defendant

Sabino more time to obtain an attorney, the Order cites to the entire subparagraph (B) and the record discloses that both issues, complexity and continuity of counsel, were discussed. Based on the belief that it was unanimously recognized to be a complex case and outside the dictates of the Speedy Trial Act, the Court continued the trial date again on September 20, 1996 and set up a status conference as is its practice when a case has been found to be complex. The defendants mischaracterize this continuance in their response. The Order is clear. It does not continue the trial date "until there was a compliance with the order by the Secretary of the Treasury" as asserted by defendants. It continues the trial date and sets a status conference to track the progress of the compliance. The record is undisputed that the September 20, 1996 Order did not contain "ends of justice" language. The defendants recognize that the omission is permissible as long as the findings of complexity and in the interest of justice were actually the factors motivating the decision. While they recognize that the delay was excludable under (h)(8)(A), the Court also believes the delay was excludable under (B)(ii) based on the Court's earlier determination of the complexity of the case. On October 31, 1996, which was the first opportunity the Court had to meet with trial attorneys, the complex nature of the case was the first topic discussed on the record. At the conclusion of that first meeting, the Court set up the next series of status conferences.

As is reflected on the record of the all-day hearing, the Court did consider the complexities of the case as the reason a continuance would serve the ends of justice before the granting of the continuance. Although it was impossible to

approximate the length of the continuance at that time, the Court stated its intention to set a series of status conferences to track the progress of the case as it had in other cases it had declared to be complex. And the Court specifically granted the continuance on the record of the hearing and in the order following it.

The record supports a determination by the preponderance of the evidence that the grant of additional time satisfied the ends of justice. A continuance based on the complexity of the case was required in the interests of justice. In retrospect and upon extensive review of Sixth Circuit caselaw on the subject, the Court believes if it would have reiterated this entire finding on the record and in each order the record would have been clearer that the reasons for the continuances were the complex nature of this case, the Court's desire to afford a fair trial to the parties and the continuances were necessary in the interests of justice to accomplish due process. Clearly, there was no indication from any defendant or the government that all parties weren't proceeding on the same assumption. As the government notes, the defendants requested and received numerous continuances and never requested a trial date or complained of any delay in the proceedings prior to the filing of the Motion under consideration. As noted by the Court, it set the trial date on February 24, 1998 and the motion under consideration was not filed until June 2, 1998.

The Court finds, therefore, that all time was excludable under the Speedy Trial Act. For this reason the Court finds that the dictates of the Speedy Trial Act were not violated and defendants' Motion to Dismiss with prejudice should be denied.

Appendix B

Moreover, were the Court to apply the Speedy Trial Act to the facts of this case, it would reach the same conclusion. Both the defendants and the government agree that the days up to and including April 2, 1997 are excludable. The Court agrees with defendants that the Court did not request additional information relating to the jury information request during the April 2, 1997 telephone conference pursuant to the dictates of *Jenkins*. The Court also agrees that the Court did not order or direct any person to report to the Court on the matter, but the Court had ordered discovery in a prior order. The government, at this conference, indicated it had requested reciprocal discovery from defendants which was not resolved until June 5, 1998. Thus, additional information was needed before trial.

The Court's disagreement with the defendants' calculations involve their interpretation of (h)(1)(J). The defendants cite no authority to support their assumption that in this multi-count, undisputedly complicated and vigorously litigated case, the Court was bound to decide all of the complicated motions pending on April 3, 1997 within the same thirty-day limit. Twelve motions remained pending after the conclusion of the Hearing. The Court was requested to review the Grand Jury transcripts. It defies common sense that a Court should be provided only the same thirty-day period of time to decide numerous complicated motions as it is to decide one motion. Justice requires the alternate interpretation in complex cases such as this. The interests of justice certainly require that a Court give due consideration and full deliberation to the arguments raised in all motions filed by all defendants. This Court endeavors to do this in every case. Several motions in this case were extremely time-

consuming as they were filed by a defendant in a *pro se* capacity and adopted by counsel after his appointment. In this case, the Court also expended more of its time than is normally true considering requests that it later found to be less than sincere i.e. the request in the Motion for a Bill of Particulars for more information identifying persons named in the Superseding Indictment whom the Court later found to be the defendants' relatives.

The Court concludes that the ramifications of defendants' interpretation of (h)(1)(J) would not serve the interests of justice in a complicated complex criminal case such as the one under consideration. It is only reasonable and in the best interests of the public and the defendant, to find that "any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the Court" applies to each motion individually. Nine motions under consideration would result in 270 excludable days.

The Court disagrees with both the defendants and the government in their belief that anytime after February 24, 1998 should not be excluded. At the conference on February 24, 1998, when the Court set the final trial date, it was obvious that defense counsel needed more time to prepare for trial. Counsel for defendant Sabino stated that he required an additional six weeks. It was the suggestion of one defense attorney that the trial be set in August to avoid a break. No defense counsel objected to the setting of the trial date. The government argues that the Stewart defendants did not provide discovery to the government until June 5, 1998.

Appendix B

Title 18, U.S.C. § 3162(a)(2) states:

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof supporting such motion, but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court should consider, among other, each of the following factors; the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

It is stipulated that the offense is serious. The Court finds that the delays were caused by the complexity of the case, the advocacy of the parties, and were required in the interests of justice. Accordingly, the Court finds that the mandates of the Speedy Trial Act were not violated under the dictates of the Speedy Trial Act. The Court finds that the defendants were brought to trial in compliance with section 3161(c) as extended by 3161(h) in this complex case.

Appendix B

Sixth Amendment Right to a Speedy Trial

In *Norris v. Schotten*, 146 F.3d 314, 326 (6th Cir.), *cert. denied*, 119 S.Ct. 348 (1998) the United States Court of Appeals for the Sixth Circuit discussed the evaluation a Court must make to determine if a defendant's Sixth Amendment right to a speedy trial has been violated.

> A four-factor balancing test has been established by the Supreme Court to determine whether there has been a violation of an accused's constitutional right to a speedy trial. These factors are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant.

Id.

In *Doggett v. United States*, 505 U.S. 647 (1992), the Supreme Court noted that, in general, a delay that approaches one year is considered presumptively prejudicial, depending on the nature and seriousness of the charges. *Id.* at 652; *Norris*, 146 F.3d at 327. In this regard, the Court notes that the defendants were out on bond during the entire pendency of the case. Defendants concede the seriousness of the crimes of conspiracy to defraud the United States and attempted tax evasion over an extended period, however, the Court will determine that the twenty-five months between the filing of the Superseding Indictment (defendants claim 825 days beginning at the filing of the first Indictment) and the trial date is presumptively prejudicial and proceed to examine the remaining factors.

The reasons for the delay stemmed mainly from the nature of the case and the vigorous representation the defendants received. Although represented by local counsel early in the case, defendants received several continuances before trial counsel were in place, the last of whom was confirmed during the October 31, 1996 hearing. The case was delayed while a list of 150 potential jurors was selected and sent to the Internal Revenue Service pursuant to Title 26, United States Code, § 6103(h)(5) prior to its amendment. The defendants requested and received numerous continuances and filed forty-one motions prior to the one now under consideration. The Court ordered the government to provide transcripts for the Court to examine for its analysis of the defendants' motions to dismiss. Reciprocal discovery was not completed by defendants until June 5, 1998. There is no evidence in the record that any part of the delay was intentionally caused by the government.

As outlined above, the Court held numerous status conferences in this case. The defense counsel were not shy about filing motions. The trial date was set based on a discussion with and agreement of the parties at a conference on February 24, 1998. Yet, no complaint as to delay was lodged or request for a trial setting was mentioned on the record or in writing until this Motion was filed on June 2, 1998

The Supreme Court has established that the prejudice inquiry must be determined in light of the interests of the defendant that the Sixth Amendment was intended to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to

limit the possibility that the defense will be impaired. *Norris*, 146 F.3d at 328, (quoting from) *Barker v. Wingo*, 407 U.S. 514, 532 (1972). As noted above, the defendants were not incarcerated. Although, defendants have asserted experiencing the anxiety and uncertainly any defendant would in awaiting trial, evidence of undue anxiety has not been placed into the record. Defendants contend that they were prejudiced because, during the delay, the government indicted Jim Morris, a potential defense witness and also used this delay to obtain further information and evidence. Jim Morris was not called as a government witness or a defense witness. Based on information submitted *in camera* to the Court, it cannot find that Morris' failure to appear as a defense witness impaired the defense in any manner. The Court finds no evidence on the record of the lengthy trial or, in fact, the entire record, that the government gained a tactical advantage in any way as a result of the delay or that the defense was impaired or actually prejudiced.

Upon balancing the four *Barker* factors, the Court concludes that defendants have not shown a violation of their Sixth Amendment right to a speedy trial.

The defendants' Motion to Dismiss the Superseding Indictment with prejudice is **DENIED**

IT IS SO ORDERED.

s/ Herman J. Weber
Herman J. Weber, Judge
United States District Court

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED AND FILED JUNE 29, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CR-1-96-46-01
CR-1-96-46-02
CR-1-96-46-03

UNITED STATES OF AMERICA,

Plaintiff,

v.

DANIEL K. STEWART,
DONNA G. STEWART,
JOE SABINO,

Defendants.

ORDER

This matter is before the Court upon the Motion in Limine (doc. no. 157), and Motion for Pre-trial Hearing regarding Coconspirator Statements (doc. no. 156) filed by defendant Daniel K. Stewart, joined by Donna G. Stewart (doc. no. 159), the responses of the Government (doc. nos. 165 and 166) and the defendants' replies (doc. nos. 169 and 171). A Hearing was held on Thursday, June 25, 1998. Pursuant to the record established during the Hearing, the Court ORDERS the following:

Appendix C

The Motion (doc. no. 156) was withdrawn by defendants and thus is **DENIED AS MOOT**. It is the law in this Circuit that the Court may admit hearsay evidence pursuant to Rule 801(d)(2)(E) only upon a showing by a preponderance of the evidence that 1) a conspiracy existed, 2) the defendant against whom the hearsay is offered is a member of the conspiracy, and 3) the hearsay statement was made in the course and in furtherance of the conspiracy. *United States v. Enright*, 579 F.2d 980, 986 (6th Cir.1978). Moreover, this preliminary finding is the sole province of the trial judge. *Id.* at 987. In all cases, this Court intends to follow the practice established pursuant to *United States v. Vinson*, 606 F.2d 149 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), of conditionally admitting co-conspirators' statements at trial, subject to a demonstration and ruling that the evidence is sufficient to establish the existence of a conspiracy by a preponderance of the evidence as sanctioned by *Enright*. *United States v. Holloway*, 731 F.2d 378, 381 (6th Cir. 1984). The defendant has a continuing objection to the evidence conditionally admitted pursuant to the *Vinson* procedure.

The Motion in Limine (doc. no. 157) is **DENIED** in keeping with the practice of this Court under *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975) and *United States v. Sullivan*, 274 U.S. 259 (1927). In open court, defense counsel moved that this ruling be certified to the United States Court of Appeals for the Sixth Circuit for immediate review. That request is **DENIED**. Certification should not be used routinely, *see Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980), but rather should be reserved for the "infrequent harsh case," *Panichella v. Pennsylvania R.R.*, 252

F.2d 452, 455 (3rd Cir.1958), *quoted in Solomon*, 782 F.2d at 60, where certification serves the interests of justice and judicial administration. *Id.*; *Curtiss-Wright Corp.*, 446 U.S. at 10. *Knafel v. Pepsi Cola Bottlers of Akron, Inc.*, 850 F.2d 1155, 1159 (6th Cir. 1988). Both parties are entitled to a jury determination of the issues before appeal would be appropriate in this case.

The pre-trial conference is **CONTINUED** to **MONDAY, JULY 6, 1998 AT 2:00 P.M.** The purpose of the conference is to view the equipment suggested by defendants for use at trial.

IT IS SO ORDERED.

s/ Herman J. Weber
Herman J. Weber, Judge
United States District Court

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED JANUARY 8, 2003

Nos. 99-3785/3786

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee Cross-Appellant,

v.

DANIEL K. STEWART AND DONNA G. STEWART,

Defendant-Appellant Cross-Appellee.

ORDER

BEFORE: DAUGHTREY and GILMAN, Circuit Judges; and COHN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

---

* Hon. Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix D

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
JUN 18 2003
OFFICE OF THE CLERK

No. 02-1513

In the Supreme Court of the United States

DANIEL K. STEWART AND DONNA G. STEWART,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
EILEEN J. O'CONNOR
Assistant Attorney General
ROBERT E. LINDSAY
ALAN HECHTKOPF
GREGORY VICTOR DAVIS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

18 pp

QUESTIONS PRESENTED

1. Whether the Fifth Amendment excused petitioners' failures to file income tax returns.

2. Whether continuances granted by the district court based on the complexity of the case resulted in a violation of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Albertson v. *SACB*, 382 U.S. 70 (1965)	9
Garner v. *United States*, 424 U.S. 648 (1976)	6, 7, 8
Grosso v. *United States*, 390 U.S. 62 (1968)	7, 8
Henderson v. *United States*, 476 U.S. 321 (1986)	11
Marchetti v. *United States*, 390 U.S. 39 (1968)	7, 8
United States v. *Clymer*, 25 F.3d 824 (9th Cir. 1994)	12, 13
United States v. *Dack*, 987 F.2d 1282 (7th Cir. 1993)	6-7
United States v. *Johnson*, 577 F.2d 1304 (5th Cir. 1978)	4, 9
United States v. *Jordan*, 915 F.2d 563 (9th Cir. 1990)	12
United States v. *Palomba*, 31 F.3d 1456 (9th Cir. 1994)	13
United States v. *Pillsbury Credit Union*, 661 F.2d 1195 (8th Cir. 1981)	7
United States v. *Sabino*, 307 F.3d 446 (6th Cir. 2002)	6
United States v. *Saussy*, 802 F.2d 849 (6th Cir. 1986), cert. denied, 480 U.S. 907 (1987)	4, 9
United States v. *Sullivan*, 274 U.S. 259 (1927)	6
United States v. *Troescher*, 99 F.3d 933 (9th Cir. 1996)	9

Constitution and statutes:	Page
U.S. Const. Amend. V	4, 6, 8
Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*	4
18 U.S.C. 3161(h)(1)(F)	9, 11
18 U.S.C. 3161(h)(1)(J)	9
18 U.S.C. 3161(h)(8)(A)	5, 10
18 U.S.C. 3161(h)(8)(B)(ii)	10, 12
18 U.S.C. 371	2, 3
26 U.S.C. 7201	2, 3
Miscellaneous:	
IRS Document 6209 (2002)	7

In the Supreme Court of the United States

No. 02-1513

DANIEL K. STEWART AND DONNA G. STEWART,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 274 F.3d 1053, and an amended and superseding opinion is reported at 307 F.3d 446.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2001. On October 16, 2002, the court of appeals granted the government's petition for rehearing and issued an amended opinion. Petitioners' petition for rehearing was denied on January 8, 2003 (Pet. App. 66a-67a). The petition for a writ of certiorari was filed on April 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioners were found guilty of conspiring to defraud the United States by obstructing the functions of the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371, and willfully attempting to evade tax, in violation of 26 U.S.C. 7201. Pet. App. 2a.

1. In 1989, the Criminal Investigation Division of the IRS conducted an investigation of Phillip Marsh, the founder of an organization called the Pilot Connection Society (PCS), which, among other things, instructed individuals on methods to evade paying federal and state income taxes. Through the execution of a search warrant on Marsh's residence and property, the IRS obtained a list of people who were affiliated with PCS. Petitioners, who owned and operated Danco Transmission, Inc. (Danco), were on that list. Pet. App. 3a.

As a result of petitioners' connection with PCS, the IRS began a civil investigation of petitioners' compliance with the tax laws. The investigation revealed that petitioners had not submitted their tax return for 1990. The IRS questioned petitioners about their failure to file the return, and they responded by "revoking" their tax returns for the years 1955 through 1989. Later, they sent the IRS anti-tax information they had obtained through their connection with PCS and other sources. Petitioners eventually filed a return for 1990, but they did not file any personal income tax returns for the years 1991 through 1994. Danco failed to file corporate tax returns for 1992, 1993, and 1994. Pet. App. 3a-4a.

The IRS then began a criminal investigation of petitioners. The investigation revealed that, in 1990, peti-

tioners closed all of their personal checking and savings accounts, redeemed certificates of deposit, and paid off loans. In addition, in 1991, they dissolved Danco under Ohio law. Danco nonetheless continued to operate. Adhering to PCS's anti-tax instructions, petitioners created seven primary trusts and transferred all of their assets, including Danco, to the trusts. The trusts paid petitioners' personal and business expenses and were used to purchase various personal items for use by petitioners and their family. No tax returns were filed on behalf of the trusts for 1992 through 1994. Pet. App. 4a.

Petitioners asked relatives, friends, and employees of Danco to serve as trustees of the trusts. The nominal trustee for each trust frequently changed. Many of the trustees did not know the nature of a trust or could not explain the nature of their responsibilities as trustee. Some trustees indicated that petitioner Donna Stewart directed the daily operations of the trusts. Petitioners' co-defendant Joe Sabino served as trustee for several of the trusts. Pet. App. 4a-5a.

2. On April 2, 1996, a federal grand jury returned an indictment against petitioners. On June 19, 1996, the grand jury returned a superseding indictment adding Sabino as a defendant. The superseding indictment charged petitioners and Sabino with conspiracy to defraud the United States by obstructing the functions of the Internal Revenue Service, in violation of 18 U.S.C. 371, and charged petitioners with four counts of willfully attempting to evade income taxes, in violation of 26 U.S.C. 7201. Following a 32-day trial, the jury found petitioners and Sabino guilty on all counts, except that petitioner Daniel Stewart was acquitted on one count of tax evasion. The district court sentenced each of the petitioners to eighteen months of imprisonment,

three years of supervised release, and a fine of $41,750. The court also ordered petitioners to pay restitution totaling $129,000. Pet. App. 5a.

3. On appeal, petitioners contended, *inter alia*, that they were entitled under the Fifth Amendment to avoid filing income tax returns and that their trial was commenced beyond the deadline allowed by the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* The court of appeals rejected those claims. Pet. App. 6a-13a.

a. In support of their Fifth Amendment claim, petitioners alleged that an IRS investigator had read them their *Miranda* rights during a 1992 interview and that an attorney later advised them not to file tax returns so as to avoid making incriminating statements in the returns. Petitioners argued that their privilege against compulsory self-incrimination was infringed when their failures to file a return were alleged as overt acts in furtherance of the charged conspiracy and were introduced by the government at trial to demonstrate petitioners' willfulness. According to petitioners, because the IRS had placed a "freeze code" on their accounts as a result of the criminal investigation, any tax returns they filed could have been used as evidence against them in a prosecution. Pet. App. 11a-12a.

In rejecting petitioners' Fifth Amendment claim, the court of appeals explained that a "taxpayer claiming a Fifth Amendment privilege against the filing of a tax return must specifically claim the privilege 'in response to particular questions, not merely in a blanket refusal to furnish any information.'" Pet. App. 11a (quoting *United States* v. *Saussy*, 802 F.2d 849, 855 (6th Cir. 1986), cert. denied, 480 U.S. 907 (1987), and *United States* v. *Johnson*, 577 F.2d 1304, 1311 (5th Cir. 1978)). Here, the court observed, petitioners "did not file any returns and thus did not lodge any particular objections

to filing the requisite information." Pet. App. 12a. The court explained that the existence of a "freeze code" on petitioners' accounts did not advance their claim, because a freeze code "constitutes nothing more than an internal act of the IRS." *Ibid.*

b. The court of appeals also rejected petitioners' claim under the Speedy Trial Act. Pet. App. 6a-11a. Petitioners acknowledged that, because of pending motions, the 70-day period allowed by the Speedy Trial Act was suspended from the date of the return of the indictment through April 2, 1997. Petitioners argued that, after that date, 350 days that were not covered by any statutory exclusion had elapsed before the trial commenced on July 7, 1998. The district court denied petitioners relief (Pet. App. 52a-59a), explaining that it had granted a series of continuances because of the complexity of the case and that those continuances suspended the 70-day period under the statutory exclusion for delays based on findings that the "ends of justice" warrant a continuance, 18 U.S.C. 3161(h)(8)(A).

The court of appeals affirmed, explaining that "[t]his was a tax evasion case of complex proportions involving the wrongful use of third parties and the hiding of assets in trusts," Pet. App. 8a, and that the district court had "granted continuances based upon ends-of-justice findings stemming from the complexity of the case," *id.* at 7a. The court added that petitioners waited to file their Speedy Trial Act motion until more than one year after the date on which they contended that the statutory period began to run, "reflect[ing] their agreement with the district court's calendar for bringing the case to trial." *Id.* at 8a. The court also observed that the district court had "convened periodic status conferences to ensure that the case proceeded expeditiously to trial." *Ibid.* Finally, the court rejected peti-